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FTC AUTHORIZATION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

FEDERAL TRADE COMMISSION REAUTHORIZATION

JUNE 7 AND 8, 1989

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FTC REAUTHORIZATION

WEDNESDAY, JUNE 7, 1989

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on the Consumer,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in room SR-253, Russell Senate Office Building, Hon. Richard H. Bryan [chairman of the subcommittee] presiding.

Staff members assigned to these hearings: Kevin Curtin; Linda Lance, staff counsels; and Sherman Joyce, minority staff counsel.

OPENING STATEMENT BY SENATOR BRYAN

Senator Bryan. The subcommittee meeting will come to order.

I welcome each of you to this hearing on the reauthorization of the Federal Trade Commission. Although I am a new member to this body, I understand that the issue of providing authorization for the FTC is not a case of first impression. In fact, my predecessors in the struggle have been attempting to reauthorize the agency since its last authorization expired in 1982.

Perhaps it is my newness to the subject, but I am committed to achieving the enactment of an FTC bill during this session of the Congress. I know I am joined in that commitment by the chairman of the full committee, Senator Hollings. And I will be developing legislation based upon information that is produced during the course of the hearing today and tomorrow.

Why is this reauthorization so necessary? Because the FTC is a vitally important agency with an important mission: to oversee the market place and to ensure that market participants act in a fair, non-deceptive and competitive way.

Congress has a role to play in this mission: to provide guidance and instruction to the FTC as to its interpretation and applications of the laws that it is charged with administering.

During the course of these hearings, we will hear from the Commission, the attorneys general of the states, consumers, business representatives and others with an interest in the effective functioning of the FTC.

I am particularly pleased that we will also receive testimony on the recent report of a committee of the antitrust division of the American Bar Association, the so-called Kirkpatrick Committee, that has evaluated the FTC and the extent to which it has fulfilled its public mandate.

We have requested that witnesses address provisions from past FTC reauthorization legislation, as well as other matters that are of concern to them.

Now, before we begin the testimony this morning, I would like to yield to my colleague, Senator McCain, for any opening statement that he would care to make.

OPENING STATEMENT BY SENATOR McCAIN

Senator **McCAIN**. Thank you, Mr. Chairman.

I appreciate the opportunity to be being here for this hearing. I welcome the commissioners. I think it is appropriate to mention that one commissioner, Mr. Calvani, who is not here, happens to be in my home state addressing the Arizona Bar Association I will certainly excuse his absence and I hope you will, too, being from a neighboring state.

I have had the opportunity to know all of the commissioners. I think they are doing an outstanding job under very difficult circumstances. I will discuss my consumer fraud bill with the commissioners and get some of their views on that bill this morning.

Also, I will be interested in their views as to how we can help them better carry out their responsibilities in a more efficient fashion.

Thank you, Mr. Chairman.

Senator **BRYAN**. Thank you very much, Senator McCain.

The statement of Chairman Hollings will be included and made a part of the record.

[The statement follows:]

OPENING STATEMENT BY THE CHAIRMAN

Mr. Chairman, I am pleased that the Consumer Subcommittee is holding hearings on reauthorization of the Federal Trade Commission (FTC), at an early stage of this Congress. The new Subcommittee Chairman, Senator Bryan, has indicated to me that he views reauthorization of the FTC as one of his highest priorities.

The last time Congress enacted an authorization bill was in 1980, and since then we have struggled unsuccessfully through conference committees in an attempt to achieve a consensus. I have witnessed first-hand the results of these efforts through my chairmanship of the Senate State-Justice-Commerce Subcommittee, where we have had to appropriate funds for the FTC without an authorization being in place.

Failure to enact an authorization gives the impression that the Congress does not consider the FTC and its mission important. But that should not be the message we send to the business and consumer communities, who need to know how to behave and what to expect from the very federal agency charged with responsibility in such important areas as antitrust, advertising, predatory practices, and consumer fraud.

I look forward to the testimony today, and to working with Senator Bryan and my other colleagues to secure enactment of a bill reauthorizing the Federal Trade Commission.

Senator **BRYAN**. It is my understanding that each member of the first panel would like to speak to the committee. And so I will ask each of you, if you will, to observe the five-minute light.

The first panel consists of Mr. Oliver, the chairman of the Commission; Ms. Azcuenaga and Mr. Strenio. And we will begin testimony with Mr. Oliver.

Mr. Oliver, good morning.

STATEMENT OF HON. DANIEL OLIVER, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. OLIVER. Good morning, Mr. Chairman. And Mr. Chairman, I am pleased to be here today to discuss the issue of reauthorization. The Commission believes it would be useful to resolve the reauthorization question, and we would support an authorization that resembles, in many respects. S.677, as approved by the Senate in the last Congress.

I have a prepared statement reflecting the Commission's position on reauthorization issues that I would like to submit for the record.

Senator BRYAN. That will be included in the record.

Mr. OLIVER. Thank you.

In my oral presentation today, I would like to supplement that statement with my own views on a few of the issues associated with the authorizing legislation.

Past House and Senate reauthorization hearings have devoted considerable time and energy to considering industry-specific, what might be called, special interest provisions. I oppose those kinds of provisions. It seems to me, they encumber the Commission's effort to carry out its statutory mandate to protect American consumers from unfair methods of competition and unfair and deceptive practices.

Special interest legislative proposals may, perhaps, be justified if they would facilitate authorization for the Commission; however, a review of the hearings before the 98th, 99th and 100th Congresses suggest that those legislative revisions are equally capable of alienating important supporters of the Federal Trade Commission.

As a result, the Commission today remains an agency without authorization. A no-frills authorization bill may, perhaps, stand a better chance of passage. In any event, I would strongly prefer such a bill.

In particular, both the Senate bill and the House bill maintain the existing limitations on the FTC's ability to investigate or even study agricultural cooperatives and to study the insurance industry.

The FTC was, in large part, created to serve as a body of experts on important issues of commerce affecting American consumers. Agricultural cooperatives, for example, appear to impose the very type of output restrictions that the courts have found to be illegal in other contexts.

No one can deny that both the agricultural and insurance industries are vital to virtually all Americans, yet Congress has, by law, imposed sharp limits on our ability even to study these industries. Is someone afraid of what the FTC might find? We must ask ourselves: Do we really believe in competition?

I urge the subcommittee to report out a bill that deletes these anti-consumer limitations.

Also, I have some reservations regarding the prohibition on unfairness rulemaking concerning advertising, although rulemaking has proven to be a cumbersome procedure, rendering the prohibition less important. Both, the Senate- and the House-passed versions of S. 677, also contain other special interest provisions which focus special attention on certain narrow industries.

In particular, section 16 of the Senate's bill seems aimed less at protecting consumers than protecting craftsmen. It would modify the FTC's broad section 5 mandate to "protect American consumers from unfair or deceptive acts or practices by explicitly defining as unfair act or practice the absence of an identifying label on imitation Indian artifacts.

Section 5 is already sufficiently broad to prohibit the unfair or deceptive sales of Indian artifacts. And, in fact, the FTC has already taken a number of steps to prevent such acts under that existing jurisdiction.

More importantly, however, this modification sets a poor precedent. If future authorizations follow this example, the FTC act could be converted into a catalog of industry-specific exemptions and definitions, many of which could, without intention, hamstring the Commission's enforcement efforts.

I see no reason to clutter up the FTC act with those kinds of concerns.

Next, I oppose any provisions that would restrict the Commission's ability to serve as the consumers' advocate before courts and other governmental entities. Thus, I oppose the provisions in both bills that could require substantial advance notice with regard to advocacy efforts; and, in the case of the House bill, would also require that this notice be provided to specified individual members of Congress.

In addition, the House bill would impose numerous other burdens on the Commission's consumer advocacy efforts, including unprecedented restrictions on release to the public of information associated with the Commission's efforts, and limitations on when comments may be provided that could make it impossible for the Commission to respond to many general public requests for comments.

Requirements such as these could frustrate the Commission's effort to serve as the advocate of American consumers at large in instances where our comments might offend a narrow, but vocal and influential, interest group.

Shortly after I became chairman, I directed that all FTC advocacy comments be forwarded to Congress promptly. Since then, our regular practice had been to forward copies to all interested members, committees and staff. This existing procedure seems preferable to a strict, advance notice requirement or other extensive restrictions on preparation and submission of consumer advocacy comments.

I am also troubled by a provision in S. 677 that would reallocate annually, specified amounts of the Commission's resources from the economic activities and Office of Policy Development budgets to the regional offices. Economic activities and the regional offices each play an important role in carrying out the Commission's enforcement responsibilities.

The relative importance of these various roles can change over time; notably, as a result of a process started in January 1987, the Commission voted last year to increase substantially, funding for the regional offices. More recently, the Commission eliminated funding for the Office of Policy Development. These examples demonstrate the importance to the Commission of being able to shift funds around as needed.

I respectfully suggest that the Commission be permitted to continue allocating its budgeted resources without inflexible monetary limitations that would reduce the agency's ability to respond to changing enforcement needs.

In closing, let me reiterate that I would strongly prefer an authorization bill which allowed the Commission to serve the public interest in as unfettered a manner as possible.

That concludes my opening statement, and I would be glad to answer any questions you may have.

[The statement and questions and answers follow:]

PREPARED STATEMENT
of
DANIEL OLIVER
CHAIRMAN
FEDERAL TRADE COMMISSION
before the
CONSUMER SUBCOMMITTEE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

June 7, 1989

Mr. Chairman and Members of the Subcommittee: I am pleased to be here today to present the views of the Commission on reauthorization of the Federal Trade Commission. As you know, the Federal Trade Commission has operated without formal authorization since late 1982. The Commission believes that it would be useful to resolve the authorization question.

Before turning to specific proposals for authorization legislation, let me briefly summarize the Federal Trade Commission's mission and some of its accomplishments during the past three years. By law, the Commission is charged with protecting consumers and businesses by ensuring that competition in the marketplace is vigorous, free, and fair. Under its antitrust authority, the Commission's efforts are aimed at fostering and preserving our competitive system with the goal of maximizing consumer welfare. In fulfilling its consumer protection role, the Commission seeks to ensure that consumers can make informed choices when exercising their purchasing power.

With regard to our consumer protection authority, since 1986, the Commission has obtained relief in 40 consumer fraud cases involving over 200 individuals and businesses. We estimate that the number of victims in these cases exceeded 1 million and approximately $100 million in consumer redress has been ordered. In the field of credit fraud and discrimination and unfair debt collection practices, an additional $6 million in redress has been ordered and civil penalties of over $1.7 million have been assessed since 1986.

Under our advertising program, we have been aggressively pursuing companies that the Commission has reason to believe may have violated the law against false and deceptive advertising. Since 1986, the Commission has issued complaints against the Campbell Soup Company, Kraft, Inc., Norelco, R.J. Reynolds Tobacco Company, Coleco, NEC Home Electronics, General Nutrition, Inc., Sunbeam Corporation, and others.

In carrying out its antitrust authority, the Commission has been equally active. During the 1988 Fiscal Year, the Commission opened over 200 antitrust investigations and challenged a total of 19 mergers, the highest number it has challenged in any recent year except 1979, when it also challenged 19. The Commission also received and reviewed over 5,000 Hart-Scott-Rodino filings concerning over 2,700 transactions, the largest number since enactment of the filing requirements. In addition, during the last 2 1/2 years, the Commission has obtained civil penalties of over $2 million in settlement of six cases alleging violations of Hart-Scott-Rodino requirements.

Turning to proposed authorization legislation, we have been asked to comment on S. 677, the FTC authorization bill developed by this subcommittee in 1987. Accordingly, I will outline briefly the Commission's position on each of the major provisions of S. 677. Different versions of S. 677 were passed by the Senate and the House during 1987. Except as noted, my comments will relate to the Senate version. I should note also that this statement reflects the views of the full Commission. Individual commissioners do not necessarily endorse all of the positions described here, but what I describe as the Commission's position represents the majority view.

First, we support the provision in the Senate bill (§ 7) that modifies the existing statutory treatment of Commission cease-and-desist orders subject to an appeal. Currently, these orders are stayed automatically whenever they are appealed. S. 677 would adopt a more sensible rule, one that resembles more nearly the treatment accorded federal district court orders that are appealed. Amendment of the FTC Act with this provision would, among other effects, limit substantially the existing incentives of respondents to slow the appeal process.

Second, we support codification, as set forth in § 5 of S. 677, of the standard in United States v. Braswell [1981-2 Trade Cas. (CCH) Para. 64,325 (N.D. Ga. 1981)] for knowing violations of litigated FTC orders. Under Section 5(m) of the Federal Trade Commission Act, once the Commission determines in an adjudicative proceeding that a certain act is unfair or deceptive, it may secure civil penalties against any person, even someone not a party to the original proceeding, who engages in the act with actual knowledge of the Commission's earlier ruling that it is unlawful. Braswell held that a person who was not a party to the original proceeding could challenge the legal conclusion that the act was unfair or deceptive. This was the interpretation of Section 5(m) agreed to by the Commission in that case and we support codification of that holding.

We also do not oppose a legislative definition of "unfair acts or practices" embodying the standards contained in the Commission's December 1980 unfairness protocol. Section 9 of S. 677 defines an unfair act or practice as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." This definition is consistent with the 1980 protocol. In the past, some have suggested that the definition should expressly refer to public policy. We believe that consumer injury is the proper focus of unfairness analysis and that consideration of public policy is inherent in that analysis.

We support language in S. 677 (§ 6) clarifying the factual showing necessary before the Commission undertakes rulemaking proceedings under Section 18(b) of the F.T.C. Act. We therefore urge the Subcommittee to adopt the provision requiring that the business practices, upon which a rulemaking would be based, be "prevalent" before initiating any rulemaking proceeding. This is, in fact, the standard presently employed by the Commission.

Although we would prefer a bill that does not include the exemption, we interpose no strong objection to the provision of S. 677 (§ 11) that would remove the Commission's authority to promulgate industry-wide rules governing advertising under the "unfair acts or practices" standard. The Commission's experience in this area suggests that rulemaking may infrequently be a useful enforcement mechanism for addressing "unfair" advertising. We also note with approval that S. 677 retained Commission authority to bring individual enforcement actions involving advertising under the "unfairness" standard. With regard to advertising, enforcement of the unfairness standard on a case-by-case basis may be more precise and less burdensome.

We do not oppose the repeal of the Commission's "public participation" authority contained in § 4 of S. 677. In theory, the original provision permitted the Commission to fund certain costs of participants in FTC rulemaking proceedings. Congress, however, has not appropriated funds for this purpose since 1980.

Also in connection with FTC rulemaking, we do not oppose a constitutional version of the legislative veto that holds in abeyance any new FTC rule pending an opportunity for review by the Congress, and implements expedited procedures for consideration of a joint veto resolution by Congress, as provided in both the Senate and the House bills. However, we note that § 13(b) of S. 677 would allow the Congress essentially to override a Presidential veto by authorizing zero appropriations for a rule's enforcement. This provision appears to frustrate the intent of the existing system of checks and balances.

Next, we oppose those portions of S. 677 as approved by the both the Senate and the House that would restrict the Commission's ability to serve as the consumer's advocate before courts or other governmental entities. Thus, we oppose the provisions in the bills that, in the case of the Senate bill (§ 15), would generally require sixty days advance notice or, in the case of the House bill (§ 8), advance notice similar to that required in the Senate bill and also notice to specified members of Congress. In addition, the House bill would impose numerous other burdens on the Commission's consumer advocacy efforts, including unprecedented restrictions on release to the public of information associated with the Commission's efforts, and limitations on when comments may be provided that could make it impossible for the Commission to respond to many general public requests for comments.

We do not believe a need exists for additional requirements such as these. Shortly after I became Chairman, I directed that all FTC advocacy comments be forwarded to Congress promptly. Since then, our regular practice has been to forward copies to all interested members, committees, and staff. This existing procedure seems preferable to a strict advance notice requirement or other extensive restrictions on preparation and submission of consumer advocacy comments.

I now turn to reauthorization issues that affect more directly the Commission's antitrust enforcement program.

Although we do not support them, we have no objection to S. 677's provisions (§§ 12, 14) requiring the Commission to submit semiannual reports on its resale price maintenance and predatory pricing enforcement efforts. We recognize Congress' need to obtain information so as to be able to conduct meaningful oversight of Commission activities. However, because the

Commission always stands ready to submit reports to Congress on any of its activities, upon receipt of a committee request, we question whether it is necessary to require submission of routine reports in the enabling legislation. On May 2 of this year, the Commission submitted the first of two reports on its predatory pricing enforcement efforts, in response to a letter from Chairman Hollings. The second of these reports will be submitted by November 1.

We believe it is unnecessary to include the provision in S. 677 (§ 16) which extends § 5 of the Federal Trade Commission Act to define as an unfair method of competition or an unfair or deceptive act or practice, the sales of imitation Indian art, crafts, and jewelry that does not bear, in English, an indelible marking of the article's country of origin. Under its existing authority, the Commission has issued over 30,000 copies of a consumer information brochure concerning the purchase of Native American jewelry. Included with the current edition of this brochure is a postage-paid consumer complaint form. We believe that § 5 is already sufficiently broad to permit the Commission to respond to complaints received as the result of this brochure and form or to act where necessary to protect consumers.

Next, we strongly oppose the provisions in both the Senate bill (§ 3) and the House bill (§ 6) continuing the existing limitation on the FTC's ability to study and investigate the effect on the American consumer of actions taken by agricultural cooperatives. We generally oppose exemptions from the antitrust and other consumer protection laws, particularly where, as in this instance, they relate to a single segment of the market. The Commission's professional staff of economists and lawyers is well situated to analyze the competitive effects of agricultural cooperatives, and to make recommendations, as appropriate, to Congress and others. This restriction therefore seems unwise. This Subcommittee would serve American consumers well by deleting it. Existing statutory restrictions denying the Commission antitrust enforcement jurisdiction over agricultural cooperatives certainly need not extend to bans on the mere study or analysis of issues in the food-growing industry.

We do not oppose S. 677's limitation on the Commission's authority over unfair methods of competition that would be exempt from challenge under the Sherman Act by virtue of the state action doctrine (§ 2). However, we question the need for such a provision. We believe that the judicially formulated state action exemption already applies to FTC cases applying Sherman Act standards.

Turning to a procedural issue, we support the provisions in both the Senate and House versions of S. 677 (Senate § 8, House § 5) which adopt the civil investigative demand (CID) as the investigatory tool to be used in the Commission's antitrust inquiries. The CID is currently used both by the Antitrust Division of the Department of Justice, and by the Commission's Bureau of Consumer Protection in non-antitrust investigations. Its features, on balance, make it a preferable tool for our antitrust enforcers as well.

We heartily support S. 677's proposal (§ 19) to allow the FTC to conduct one-year studies related to "medigap" insurance and liability insurance, although since development of S. 677, one of the studies, concerning medigap insurance, has been conducted by the FTC, at the request of the House Energy and Commerce Committee. We regret, however, that S. 677 does not propose to allow the Commission broader authority to study the "business of insurance." The FTC Act now precludes the Commission from conducting studies or preparing reports concerning the business of insurance, unless a majority of the members of the Senate or House Commerce Committees so request. Moreover, as with S. 677's proposals, the authority to conduct any such requested study expires with the Congress during which the request is made.

A principal reason for the FTC's creation was to serve as a body of experts on important issues of commerce that affect American consumers. To discharge that duty, over the years, the Commission has assembled a highly trained staff of economists, accountants, lawyers, and other professionals. No one can deny that the insurance industry is a vital one for virtually all Americans. And yet, the Commission's ability to study the industry is sharply limited. We see no reason for continuing the restriction with respect to the business of insurance.

We also question the wisdom of the provision in S. 677 (§ 17) to reallocate annually specified amounts of the Commission's resources from the budgets of two specified programs. Last year, the Commission voted to increase the size of the regional office staffs and redirected funds exceeding those specified in S. 677 to the regional offices. Therefore, while we agree that regional offices play an important role in carrying out the Commission's enforcement responsibilities, we respectfully suggest that the Commission be permitted to continue to allocate the resources budgeted to it without imposing inflexible monetary limitations that will reduce the agency's ability to respond to changing enforcement needs. In addition, it should be noted that one of the two programs that S. 677 targets as a source of funds for the regional offices has not been funded in the FTC's 1990 budget.

With regard to funding, we support the Administration's proposed figure of $69.58 million for Fiscal Year 1990. This amount, which represents a modest increase over our Fiscal 1989 appropriation, will only enable us to maintain our current workyears while meeting uncontrollable pay and benefit increases and certain inflationary price increases.

Mr. Chairman, that concludes my prepared statement. I will be pleased to address any questions that you or other Members of the Subcommittee might have.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

July 28, 1989

The Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
Committee on Commerce,
Science, and Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Chairman Bryan:

The Commission is pleased to respond to the questions you have asked in your letter of June 12, 1989, as a follow-up to the Commission's testimony on June 7, 1989, concerning the agency's reauthorization. While some of the information contained in the responses to your questions is nonpublic, none is exempt from mandatory public disclosure under the Freedom of Information Act, 5 U.S.C. § 552. Accordingly, the Commission does not request that the Subcommittee accord the responses confidential treatment. Please advise us if we may be of further assistance to the Subcommittee.

By direction of the Commission,*

Daniel Oliver

Daniel Oliver
Chairman

Enclosure

* Commissioner Calvani dissenting.

FEDERAL TRADE COMMISSION'S RESPONSES TO QUESTIONS FROM THE SENATE SUBCOMMITTEE ON CONSUMER PROTECTION

Question 1: **The FTC now has fewer employees than at any time since fiscal year 1961, and in the ten-year period from 1979 to 1989, FTC workyears fell 48 percent. This occurred while the FTC was facing increased demands. For example, in this same ten-year period, the number of Hart-Scott-Rodino merger filings rose by 334 percent.**

CHAIRMAN OLIVER: **In a speech to the Antitrust Division of the American Bar Association earlier this year, you seemed to express the notion that additional resources for the FTC would only result in "overregulation" and were unnecessary.**

COMMISSIONER STRENIO: **In May, you gave an address at Notre Dame University that said the dwindling staff resources at the FTC had adversely affected its operations.**

-- How do you reconcile these positions?

The Federal Trade Commission is an independent administrative agency composed of five members appointed by the President and confirmed by the Senate for terms of seven years. The terms are staggered and no more than three Commissioners may be from any one political party. This organizational structure is intended to assure diversity of opinion.

Question 2: **The Kirkpatrick committee found that the FTC has become top-heavy, with too many "Chiefs" and not enough "Indians" (page 95). This interferes with the agency's effectiveness because it makes the decision-making process so cumbersome and reduces the staff who can be on the front line fighting issues that should be addressed.**

-- Do you agree with the assessment that the agency is top-heavy?

-- If so, what plans does the FTC have to address this matter?

ANSWER:

It is true that, as the FTC has declined in size, the ratio of "Chiefs" to "Indians" has increased. Absent some major structural change (such as a consolidation of bureaus or the closure of some regional offices), certain managerial positions will continue to exist, regardless of the size of the agency. Thus, the agency will have five Commissioners, three Bureau Directors, a General Counsel, an Executive Director, 10 Regional Directors, etc., irrespective of the number of employees.

The number of levels of review of the staff's work product, however, has not increased in recent years, and the Commission does not believe that its organizational structure interferes with the effectiveness of the agency. Nor does it believe that those employees whose partial, or even primary, role is to review the work of others perform a superfluous task. Although it is correct that excessive bureaucratic review and grade inflation can waste an agency's resources and undermine the effectiveness of its decision-making process, the review of staff work by experienced lawyers and economists contributes substantively and substantially to the end product. It is a means of combining the often fresh analytic approaches of junior staff and the expertise of those whose experience often provides perspective and continuity.

Short of major restructuring, opportunities for reducing the number of "Chiefs" in the agency may come about through consolidation of line divisions within the Bureaus or through reduction in the number of personal staff assigned to Commissioners, Bureau Directors, and other senior management. Consolidation has occurred in both the Bureau of Consumer Protection and the Bureau of Competition.[1] In 1982, the Bureau of Consumer Protection reorganized itself to combine 42 programs into 22, and to reduce the number of litigation divisions reporting to the Bureau Director from eight to five. Since 1982, the Bureau of Competition has eliminated three of its litigation divisions, leaving seven in existence today.

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[1] Separate views of Commissioner Azcuenaga attached.

While individual Commissioners might organize the staffs of the Bureaus somewhat differently if faced with that responsibility, the Commission believes that determination of the optimal overall skill mix and specific staff assignments within Bureaus in general is best left to the sound discretion of the managers charged with accountability for the work of those organizations.

Finally, to the extent that conferring a title on a senior lawyer or economist is a means, albeit small, of recognizing the special contributions of more senior personnel, it serves a useful function.

Question 3: **Your statement applauds the activities of the FTC in the areas of advertising, consumer protection (including consumer fraud), and antitrust. Yet, many have suggested that the FTC has not been aggressive enough in these areas.**

For example, these critics say that the FTC has not devoted sufficient resources to advertising practices, or has misdirected its resources toward small violators while paying little attention to national issues that affect many consumers.

-- Do you agree with these criticisms? If not, how do you respond to them?

-- How much, if at all, are resources a part of this perception or problem?

ANSWER:

Consumer Protection Enforcement

As indicated in the Commission's reauthorization statement, we have been very active in the consumer protection area and particularly in the prosecution of national advertising cases. During the past year alone, for example, the Commission has been in litigation with R.J. Reynolds,[2] Kraft,[3] North American Philips[4] and Campbell Soup Company[5] over claims made in their advertising; and it has accepted consent orders from Alamo

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[2] R.J. Reynolds Tobacco Co., Docket No. 9206, complaint issued (June 16, 1986) (withdrawn from adjudication for consideration of consent agreement).

[3] Kraft, Inc., Docket No. 9208, initial decision issued (April 3, 1989).

[4] North American Philips Corp., Docket No. 9209, final order (October 24, 1988).

[5] Campbell Soup Company, Docket No. 9223, complaint issued (January 25, 1989).

Rental Cars,[6] Coleco[7] and Associated Mills[8] concerning their advertising. At the same time that we have been active in challenging deceptive advertising by large companies, we have also been active in challenging deceptive national advertising by smaller companies, such as manufacturers of artificial suntanning equipment[9] and promoters of products on nationally televised "program length commercials."[10] The Commission's aim in the consumer protection area is to thwart, and where possible redress, consumer injury caused by unfair or deceptive acts or practices. The key factor in determining Commission action is the magnitude of the consumer injury, not the size of the business causing the harm.

Presumably with increased resources the Commission could bring more cases. Nevertheless, the Commission has been able to maintain a strong advertising regulation program with its current resource allocation and increased resources will not necessarily increase the number of deception cases. The Commission is satisfied with the current allocation of resources to advertising practices and other consumer protection areas, including fraud.

Critics have not identified specific cases where failure by the Commission to act has injured consumers. Many potentially deceptive acts or practices are thoroughly investigated by the Commission staff but do not result in the issuance of a complaint or consent agreement. Thus, the public may be unaware of a substantial amount of enforcement activity.

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[6] *Alamo Rent a Car*, Docket No. C-3251, final consent agreement accepted (April 28, 1989).

[7] *Coleco*, FTC File No. 882-3009, proposed consent agreement accepted for public comment (January 17, 1989).

[8] *Associated Mills, Inc.*, FTC File No. 872-3075, proposed consent agreement accepted for public comment (January 18, 1989).

[9] *Sun Industries, Inc.*, Docket No. C-3230 (May 13, 1988); *The Silver Group*, Docket No. C-3225 (April 13, 1988); *An-Mar International Ltd. Inc.*, FTC File No. 882-3163, proposed consent agreement accepted for public comment (May 9, 1989).

[10] *JS&A Group, Inc.*, Docket No. C - 3248, final consent agreement accepted (March 20, 1989); *F.T.C. v. Pantron I Corp.*, No. 88-6696 RG (Ex) (C.D. Cal. Nov. 14, 1988) (complaint filed); *F.T.C. v. California Pacific Research, Inc.*, No. N-88-602-BRT, (D. Nev. Nov. 14, 1988)(complaint filed).

Antitrust Enforcement

The Commission's recent antitrust enforcement efforts have continued to be rigorous and demonstrate an effective use of resources. In the merger area, the Commission took 34 actions, determining to seek preliminary injunctions in 20 instances. In 13 of those 20, the parties subsequently abandoned the challenged transaction, and in three others the Commission obtained consent orders. Four cases remain in active litigation. In the 14 non-preliminary injunction matters, the Commission issued consent orders in seven, accepted consent orders for public comment in three others, issued an opinion and divestiture order in one, and accepted curative measures by the acquiring company without issuing a complaint. Administrative litigation continues in the two remaining matters. Over the past 2 1/2 years, the Commission obtained six civil penalty settlements totalling over 5 million dollars for violations of the Hart-Scott-Rodino Antitrust Improvements Act's premerger notification filing requirements.

Outside the merger area, in other antitrust matters, the Commission has issued two opinions accompanying cease and desist orders, filed 10 complaints commencing administrative litigation, issued 18 consent orders prohibiting anticompetitive conduct, and accepted four consent orders for public comment. Moreover, the Commission has obtained civil penalties totalling $700,000 for violation of Commission orders.

Question 4: The recent Kirkpatrick report says that the public too seldom has the idea that the FTC is moving aggressively against false and deceptive advertising (page 34).

-- Do you agree with these criticisms? If not, how do you respond to them?

-- Can you identify areas of future inquiry regarding advertising?

ANSWER:

The Commission strongly believes that it is important to move aggressively against false and deceptive advertising and has sought to assure the public of this, by its actions and words whenever possible. The public perception to which you refer may be attributed to a number of factors:

First, the FTC has followed a firm policy of conducting its investigations on a non-public basis. The FTC staff does not take public positions on the truth or falsity of advertising claims until an investigation is completed and the matter is closed, or the Commission has determined that it is appropriate to initiate enforcement action challenging the practice.

Second, when the Commission closes an investigation, statutory restrictions on disclosing information submitted by companies under investigation often limit the ability of the Commission staff to explain the basis for its action.

Third, as a matter of resource management, the Commission focuses its enforcement efforts on advertising matters that its investigations suggest will not be resolved through existing self-regulation systems in the advertising industry. To this end, the Commission has traditionally refrained from taking action against false or deceptive advertising discontinued as a result of the industry self-regulatory process.

Fourth, the Commission has always believed that truthful advertising provides important benefits to consumers and that unnecessary private, self-regulatory, and governmental restraints on truthful advertising can injure consumers. Unfortunately, the Commission's efforts to ensure that truthful advertising is not unnecessarily restrained have sometimes been misinterpreted as support for deceptive advertising.[11] In fact, Commission cases and comments on advertising restraints make clear that cases of deceptive advertising should be vigorously prosecuted. What the Commission has objected to are broad prophylactic requirements that stifle truthful as well as deceptive speech. To this extent the Commission's concerns are not significantly different from those expressed by the courts in cases dealing with the application of the First Amendment to commercial speech.

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[11] Separate views of Commissioner Azcuenaga attached.

The Commission will continue to focus its resources in the future on cases involving claims that consumers would find difficult to evaluate (such as performance claims) and which are likely to cause consumer injury. Cases involving health claims for food and drug products will be given high priority. Similarly, the Commission will continue to scrutinize closely cosmetic advertising and safety claims such as those made by manufacturers of artificial suntanning equipment.

Also, while cases concerning claims involving the health and safety of consumers will continue to receive the highest priority, marketing practices involving purely economic injury, such as deceptive car rental advertising, "program length" commercials, children's 900 story line numbers, unsubstantiated weight loss claims, and unsubstantiated therapeutic claims for cosmetic products are also areas of current focus.

Question 5: **The regional offices have traditionally been a very productive enforcement arm in virtually every category of FTC activity. Yet the Kirkpatrick report found that the FTC allocated resources disproportionately to the regional offices (page 95).**

-- In view of the obvious contribution made by the regional offices to the FTC's overall mission, how do you reconcile these two statements?

ANSWER:

The Commission carefully studied the role of its regional offices and issues related to the optimal allocation of resources to the regional offices in the spring of 1987. Based on this review, and consistent with the premise of your question, the Commission unanimously voted to increase the level of resources devoted to its regional offices.

The problem of the allocation of resources between the regional offices and headquarters has been highlighted by recent budget cuts. The Commission's decision to expand regional offices was made at a time when the agency had more funding, in real dollar terms, than currently is the case. Consistent with the Kirkpatrick report's conclusion, one consequence of reduced funding levels is that headquarters staff is stretched thin while the regional offices have not shared proportionately in the most recent reduction. As the budget constraints persist, the Commission may have to reconsider its allocation of resources to the regional offices to ensure an optimal balance in the workload between headquarters and the regional offices.

Question 6:	**During the hearing, I raised the issue of telemarketing fraud, a problem nationwide but particularly in my State of Nevada. Please provide specific information regarding statutory changes (and justifications therefor) desired by the FTC in this area.**

ANSWER:

The Commission recognizes that telemarketing fraud has become a serious problem costing consumers over a billion dollars a year. The Commission has responded by greatly increasing its enforcement efforts in this area. Since 1982, the Commission has opened over eighty investigations of telemarketers and has brought thirty-three cases against alleged telemarketing frauds in federal court. In these cases, the Commission obtained injunctions against companies having aggregate sales of over $628 million.

The Commission has experienced some difficulty in bringing cases against fraudulent telemarketers due to problems in four important areas: venue requirements for FTC cases, access to the financial records of individual defendants, use of mail covers in FTC investigations, and use of Civil Investigative Demands to obtain physical evidence. The Commission has supported proposed legislation and offered recommendations to address these deficiencies on several occasions, most recently before the House Subcommittee on Transportation and Hazardous Materials on March 16, 1989. Chairman Oliver's March 16, 1989 testimony, which sets forth specific recommendations for improving the Commission's law enforcement authority in these four areas (at pp. 11-13), is enclosed.

Question 7: **As you know, the Consumer Advocacy Program generated considerable controversy during the reauthorization process in the last Congress. Since that time, it is my understanding that various processes have been put into place regarding this program.**

-- Please identify the changes that have occurred.

In April 1988, the Commission established the Office of Consumer and Competition Advocacy ("OCCA") to assume internal responsibility for the advocacy program. OCCA is the central Commission source for planning, coordination, review, and information about proposed comments. One of the chief purposes of this change was to facilitate Commission review of individual comments and of the advocacy program in general. Procedural changes include a clearer statement that the staff comments are not necessarily the views of the Commission or of any individual Commissioner. In addition, the staff only comments when an appropriate official issues a specific and written invitation to do so or when a governmental or self-regulatory body requests comments from the public generally.

-- Has the overall level of activity in this program declined, remained the same, or increased?

During fiscal year 1988, the year of the program's reorganization, the number of advocacy comments declined to 33 from 102 the previous fiscal year. During the current fiscal year, 69 comments have been authorized to date. Three of these comments were Commission amicus curiae briefs to various United States Court of Appeals, three were Commission letters, two were Commission submissions to the International Trade Commission, and the remainder were staff comments to various federal, state, and local governmental and self-regulatory bodies.

-- Do you oppose all legislative restrictions on this program, or is it just that you think that the proposed limitations are too onerous?

The changes discussed above have significantly improved the Commission's advocacy program. In its present form, the program ably advances the Commission's historic mission of providing other governmental bodies with the benefits of its experience in antitrust and consumer protection law and in economic analysis of various markets. The current legislative proposal to impose a 60-day advance notice requirement could be quite burdensome and could, in many instances, prevent the Commission or its staff from advocating consumer interests. Indeed, the working realities of the advocacy program are such that any advance notice is frequently impracticable. Invitations to the FTC to comment on proposed legislation or regulations often arrive far less than 60 days in advance. It also is extremely rare for comments to be authorized more than a day or two before the filing deadline. In response to Congressional requests for more information about the advocacy program, the Office of Consumer and Competition Advocacy has recently assumed responsibility for providing copies of all authorized comments to staff of the Congressional oversight committees as soon as they are issued. We believe that the structural and procedural changes that we have made to the Consumer and Competition Advocacy Program have addressed the concerns that Congress has raised concerning the program in the past. Additionally, the Commission will continue to review the advocacy program and make further changes as needed.

In addition, the Kirkpatrick report characterized the FTC's Competition and Consumer Advocacy Program as one of the most important of the FTC's various projects and concluded that restrictions proposed by the FTC Reauthorization bills separately passed by the House (H.R. 2897) and Senate (S.67) during the 100th Congress are ill-advised.

Question 8: What is the status of the settlement offer made by Textron regarding the acquisition of Avdel Corporation? When do you anticipate that the Commissioners will consider this offer?

ANSWER:

The Textron/Avdel proceeding, In the Matter of Textron Inc., Docket No. 9226, is presently in pre-trial status before an administrative law judge. Under the Commission's rules, the Commissioners themselves are not involved in a case at this stage of the proceeding unless (1) an issue is presented on interlocutory appeal, or (2) the parties submit to the administrative law judge a motion to withdraw the matter from adjudication for the purpose of considering a proposed consent agreement. Commission Rules of Practice 3.23, 3.25, 16 C.F.R. ((3.23, 3.25. Settlement negotiations may be supervised by the administrative law judge, id. (3.25(a), but the parties may also confer without consulting the judge. Due to rules prohibiting ex parte communications, Commission Rule of Practice 4.7, 16 C.F.R. (4.7, the Commission will have no knowledge of, or involvement in, settlement discussions until the parties present a proposed consent agreement for its consideration. The parties in the Textron case have not filed such a motion, and therefore the Commission is unable to provide any information on the status or likely timing of settlement discussions.

Question 9: **How much emphasis does the FTC give to International Trade considerations in its antitrust reviews? Should our antitrust laws be relaxed to allow American companies to compete more effectively in the world market, or are the laws adequate as they are currently written?**

ANSWER:

The Commission believes that the purpose of the antitrust laws is to promote the interests of consumers. In its 1982 Statement Concerning Horizontal Mergers, and in subsequent enforcement actions, the Commission has targeted only those business arrangements that confer market power on the acquiring firm or enhance the ability of firms to collude. In analyzing such business arrangements, the Commission gives careful consideration to the competitive realities that exist in markets for the products or services in question and, in particular, to whether substantial competition is afforded by foreign firms.

We believe that, if markets are properly analyzed, there is no necessary tension between the international competitiveness of American firms and the antitrust laws. Where the conduct of American firms has an impact only in foreign countries, the antitrust laws generally do not apply. See Foreign Trade Antitrust Improvements Act, codified at 15 U.S.C. ((6a, 45(a)(3). And, where the conduct does have an effect in the United States as well as in foreign countries, the antitrust laws do not prohibit conduct the purpose and effect of which are to promote output and lower price -- the essence of competitiveness. The antitrust laws restrain only conduct that has an adverse impact on consumers. To permit collusion or anticompetitive mergers among U.S. firms would not only injure consumers, but would also tend to diminish the ability of those firms to contend successfully with foreign competition.

Question 10: Section 110(a)(2) of the Magnuson-Moss Act empowers the FTC to adopt minimum requirements for dispute resolution mechanisms, and Section 111 of that Act addresses the relationship between activities under the Act and State law. Do these sections authorize the FTC to preempt State laws? If so, to what extent?

ANSWER:

As Congress has provided by statute, Commission rules adopted pursuant to Section 110(a) of the Magnuson-Moss Warranty Act ("MMWA") may preempt some aspects of state law. Section 111(c) of the MMWA provides that state requirements relating to labeling and disclosure are preempted, unless a state is able to show that such state requirements afford greater protection to consumers than federal requirements and do not unduly burden interstate commerce. It is also clear, however, that the Commission's preemptive authority is not unlimited, because Section 111(b) of the MMWA states that nothing in the Act "shall invalidate or restrict any right or remedy of any consumer under State law . . . ."

To date, the Commission has not decided the extent to which its rules under the MMWA may preempt state law. A petition was filed with the Commission on April 11, 1988, by the Motor Vehicle Manufacturers Association of the United States, Inc. and the Automobile Importers of America, Inc., raising broad preemption questions relating to informal dispute resolution mechanisms governed by Commission Rule 703, 16 CFR 703. In addition to other substantive revisions of Rule 703, the petitioners' proposal seeks Commission preemption of state law provisions that impose different requirements upon Rule 703 mechanisms than those specified in Rule 703 itself.

On May 16, 1989, the Commission published an Advance Notice of Proposed Rulemaking ("ANPR") to request public comment on whether to amend Rule 703. 54 Federal Register 21070. Several of the questions in the ANPR seek comment on the issue of the Commission's legal authority under the Magnuson-Moss Warranty Act to preempt state provisions governing Rule 703 mechanisms. Since these issues are pending before the Commission, it would be premature for the Commission to express an opinion on this question until all relevant public comments are received and carefully evaluated.

Question 11: **Section 110(a)(4) of the Magnuson-Moss Act authorizes the Commission on its own initiative, or upon written complaint filed by any interested person, to review the bona fide operation of any dispute settlement procedure resort to which is stated in the written warranty to be a prerequisite to pursing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of Rule 703, the Commission may take appropriate remedial action under any authority it may have under this title or any other provision of law.**

-- When the FTC receives complaints from interested persons pursuant to this section, what measures does it take to determine if a procedure fails to comply with Rule 703? Are there any instances where such complaints have generated no action -- not even a response -- from the FTC?

-- What actions to date has the FTC taken on its own initiative to determine if a procedure fails to comply with Rule 703?

ANSWER:

When complaints are received regarding Rule 703, the staff reviews them and, as appropriate, asks the operator of the informal dispute settlement mechanism involved to investigate the complaint and to report its findings back to the Commission staff. The staff then evaluates the operator's response and may also contact the complainant again if additional information is required. To our knowledge, all such complaints have generated a response from the FTC.

The Commission staff monitors complaints from the public on Rule 703 mechanisms, obtains the annual audits submitted by the mechanism operators, and reviews them for possible rule violations.

Question 12: **Auto manufacturers have petitioned the FTC to halt existing state authority to regulate industry's Informal Dispute Resolution Mechanisms (IDSMs) by invoking preemption under the Federal Magnuson-Moss Warranty Act. Has the FTC ever asserted or disclaimed the existence of preemptive powers under the Act?**

ANSWER:

The question of whether the Magnuson-Moss Warranty Act would permit the Commission to preempt state authority to regulate industry IDSMs has only recently been raised. To date, the Commission has neither asserted nor disclaimed the existence of preemptive powers under the Magnuson-Moss Warranty Act with regard to Rule 703. See also the response to question 10.

Question 13: Is it **~~It is~~ reasonable to assume that this effort to preempt the states would result in less enforcement in certifying informal dispute settlement mechanisms?**

ANSWER:

Currently, the Commission's Rules do not provide for Commission certification of IDSMs. The ANPR that was published on May 16, 1989, requests public comment on the issue of Commission certification. The Commission and its staff will analyze the comments on this question before determining whether the Commission should propose amendments to Rule 703 providing for such certification. Questions regarding the level of enforcement activity will depend on the nature of the certification program, if any, that is adopted. Because Rule 703 does not currently contain a certification component, the Commission cannot assess the effect that various possible certification programs might have on enforcement levels.

Question 14: **What resources does the Federal Trade Commission currently have, or would it need in order to make enforcement of Rule 703 procedures effective?**

ANSWER:

In fiscal 1989, the Commission allocated one workyear for Rule 703 activities. Under the current level of resources, staff has focused on reviewing audit reports to ensure that the procedures set up by the mechanisms comport with the Rule's requirements, and on responding to consumer complaints about mechanisms' operating procedures. Funding is presently adequate for these functions.

If the Commission should decide to engage in an amendment proceeding to change the requirements of the rule, so as either to increase the Commission's obligations or increase participation by companies offering warranties, additional allocation of resources may be necessary. The nature of any amendments would necessarily dictate what level of resources would become appropriate to enforce the rule adequately.

Question 15: **The FTC recently published recommendations for changes in the guides for advertising allowances.**

-- What is the FTC's goals in making these recommendations?

ANSWER:

The proposed changes in the Guides for Advertising Allowances (Guides) seek to clarify and update the Guides. The FTC originally published its Guides in 1969 and revised them in 1972. The 1972 Guides do not reflect judicial decisions of the past 17 years. For example, the 1972 Guides restrict the meeting competition defense of the Act to offers made to a specific customer, but the Supreme Court's decision in Falls City Industries Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983), extends the defense to area-wide offers not confined to specific customers. The proposed Guides incorporate this and other case law developments.

-- Do most of the comments received during the public comment period favor or object to the proposed changes?

ANSWER:

The FTC has now received more than 250 comments. Almost all favor the Commission's goal of having the Guides reflect current law. Of course, the commentators disagree over particular proposed provisions. The Commission will carefully consider the legal, economic, business, and other perspectives reflected in each of the comments, and will adopt only those provisions that accurately represent the law.

-- What, in your opinion, are the positive aspects of the current guidelines? What are the negative effects of the guidelines?

ANSWER:

The positive aspects are that Guides offer a single, convenient place for members of the business community to ascertain the requirements of Section 2(d) and (e) of the Robinson-Patman Act. The negative effects are that the current Guides in some areas no longer accurately reflect those requirements. Commission action on the proposed changes should remedy this situation.

-- What is the projected timing for issuing the changes?

ANSWER:

We hope to consider any changes in the next three to four months. Most of this time will be spent in evaluating the comments we have received and in considering possible modifications to the proposed guides.

Question 16: **Please discuss the concept of "value of the promotion to the seller." With regard to these advertising allowance guidelines, what interpretations of the Robinson-Patman Act might permit a value-to-the-seller test to be valid?**

ANSWER:

The "value of the promotion to the seller" is one standard that could be used in determining whether a seller is offering promotional allowances to its customers on proportionately equal terms, as required by the Act. This standard may most readily be understood as reflecting the benefit to the seller that results from the additional sales generated by the promotion. Value to the seller might be measured by the additional units of seller's product sold during the promotional period. The Commission's decision in Lever Bros. Co., 50 FTC 494 (1953), has been read to suggest that the value to the seller is a legitimate standard for measuring proportional equality.

Question 17: **The Robinson-Patman Act was born out of Congress' concern that the buying practices of large retailers was threatening the continued existence of the small independent merchant. What should be the FTC's role in enforcing this Act? Should ~~the~~ small business be protected, even at the expense of economic efficiency?**

ANSWER:

The Robinson-Patman Act was enacted during the Great Depression, when the prevailing fear was that large companies and retail chains could act as predators to eliminate smaller enterprises, and that "power buyers" could use their economic power unfairly to exact price concessions from relatively weaker sellers. Thus, the Act can be viewed as a measure to protect small business even where enforcement would be anticompetitive or promote inefficiency. More than three decades ago, however, the Supreme Court directed that the Act "should be construed so as to ensure its coherence with the broader antitrust policies that have been laid down by Congress", *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 74 (1953), *accord* *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978), i.e., in a manner that promotes competition, efficiency and ultimately consumer welfare. The Commission must resolve any tension between the interests of small business and consumer welfare on a case-by-case basis.[12]

In general, we believe that requiring firms to administer inefficient pricing systems may be harmful to our economy and, in any event, as experience has shown, does not appear to advance effectively the interests of small businesses. The fact that small firms thrive in many markets despite relatively infrequent Robinson Patman enforcement suggests that special antitrust protection is probably not essential to their survival. Even if assistance were thought desirable, in some cases direct financial aid would be preferable to legislation that can injure efficient competitors and consumers.

The Commission is committed to enforcing all the laws under its jurisdiction. As our recent enforcement record demonstrates, when we find possible violations of the Robinson-Patman or other pertinent laws, we investigate them and issue complaints as appropriate. *See*, *e.g.*, *Harper & Row, Inc.*, D. 9217; *MacMillan, Inc.*, D. 9218; *The Hearst Corp.*, D. 9219; *The Putnam Berkley Group, Inc.*, D. 9220; *Simon & Schuster, Inc.*, D. 9221; *Random House, Inc.*, D. 9222. In determining what investigations to pursue, the Commission weighs a variety of factors, including the difficulty of proving a violation of law under prevailing legal standards, the competing demands on our enforcement resources, and the degree to which enforcement action will further a given law's purposes, serve the public interest, and enhance consumer welfare. For the past 20 to 25 years, over several administrations, Robinson-Patman Act enforcement by the FTC has been at a relatively consistent level, resulting in about two cases or consent orders per year.

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[12] Separate views of Commissioner Azcuenaga attached.

OFFICE OF
THE COMMISSIONER

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

July 28, 1989

The Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
Committee on Commerce, Science
  and Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Chairman Bryan:

By letter of this date, the Commission has responded to the questions you raised in your letter of June 12, 1989, as a follow-up to the Commission's testimony on June 7, 1989, concerning the agency's reauthorization. Although I agree with most of the points made in these responses, I am writing separately to address several of your questions on which I have either differing or additional views.

Please let me know if I may be of further assistance to you or the Subcommittee. Thank you.

Sincerely yours,

Mary Azcuenaga

Mary L. Azcuenaga

Attachment

SEPARATE COMMENTS OF COMMISSIONER MARY L. AZCUENAGA

Question 2:	**The Kirkpatrick committee found that the FTC has become top-heavy, with too many "Chiefs" and not enough "Indians" (page 95). This interferes with the agency's effectiveness because it makes the decision-making process so cumbersome and reduces the staff who can be on the front line fighting issues that should be addressed.**

-- Do you agree with the assessment that the agency is top-heavy?

-- If so, what plans does the FTC have to address this matter?

Answer:

Like my colleagues, I do not agree that the Commission is "top heavy," with too many "chiefs" and not enough "Indians," or that its staffing patterns reflect an inefficient use of resources. Assertions to the contrary may rest in part on the erroneous assumption that review is in all cases superfluous. On occasion, the Commission, like any large organization, has experienced isolated instances of what might be termed excessive review that may have caused undue delay or unnecessary duplication of effort. These instances, however, have reflected not misallocation of resources, but rather, specific management problems. To respond to these instances by disparaging the review process as a whole, seems to me too facile. To respond to them by arbitrarily reducing the number of titled positions at the agency would address the wrong problem. We need instead to continue to encourage managers to promote excellence at all levels of the process.

The Commission's response suggests as an option for reducing the number of "chiefs" in the agency a reduction in the number of personal staff assigned to, among others, members of the Commission. I view this suggestion as potentially very damaging. Under Reorganization Plan 8 of 1950, almost all of the staff of the Federal Trade Commission report to the Chairman for administrative purposes. The only exceptions to this rule are the personal staffs of the individual commissioners. To some extent, individual commissioners may and do request and obtain views and assistance from the agency staff. More often than not, however, the assistance and views received reflect the views of the Chairman and the senior staff appointed by the Chairman. For independent analysis, members of the Commission must rely on themselves and on their own staffs.

The work done by attorneys and economists in an individual commissioner's office is not review of the sort the Kirkpatrick Committee seems to have had in mind. Rather, that work is an integral part of the commissioners's analysis that forms the necessary basis for the decisions that they are charged individually with making. In short, a commissioner's staff is an extension of a commissioner.

The independence of individual members of the Commission is one of the most important aspects of their office. Mandated reduction of the current, hardly extravagant, size of these personal staffs would be a serious threat to that independence and therefore to the effectiveness of the agency.

Question 4: The recent Kirkpatrick report says that the public too seldom has the idea that the FTC is moving aggressively against false and deceptive advertising (page 34).

- **Do you agree with these criticisms? If not, how do you respond to them?**
- **Can you identify areas of future inquiry regarding advertising?**

Answer:

In response to question 4 relating to public perceptions of the Commission's enforcement posture on deceptive advertising, I agree with the first three explanations why the public might mistakenly perceive that the Commission is not vigorously prosecuting false advertising. I cannot, however, fully agree with the discussion of the fourth explanation, which obscures my concern that the Commission may indeed be going too far in its efforts to restrict state government regulation of deceptive advertising. Although the Commission properly can take pride in its efforts and accomplishments both to eliminate deceptive advertising and to eliminate harmful restraints on truthful advertising, I fear that overly zealous extensions in some of these endeavors actually may inhibit or restrict legitimate efforts by the states to protect consumers.

This concern stems from Commission action to block certain state regulatory efforts to halt deception or to protect health and safety. See Texas Board of Chiropractic Examiners, 54 Fed. Reg. 13,695 (April 5, 1989). Under our federal system of government, the States have many legitimate governmental interests, including not only the prevention of fraud and deception within their borders, but also the preservation of public health and safety. The judgments of state regulators in their efforts to protect their citizens are entitled to appropriate deference. Principles of federalism cause me to question whether the Federal Trade Commission should establish itself as a supra-legislature pronouncing for each state board which, if any, of its regulations is optimal.

Question 17: **The Robinson-Patman Act was born out of Congress' concern that the buying practices of large retailers was threatening the continued existence of the small independent merchant. What should be the FTC's role in enforcing this Act? Should the small business be protected, even at the expense of economic efficiency?**

Answer:

I agree with my colleagues that the Commission should be, and is, committed to enforcing all of the laws committed to its jurisdiction by Congress. I have, however, a somewhat different perspective. The Robinson-Patman Act contains two injury formulations. The first is essentially the same as that under § 7 of the Clayton Act and focuses on the overall market. The second formulation typically focuses on competitive effects among firms at the reseller level. When the competitive effect described by this second test is demonstrated, it cannot be ignored "on the grounds that efficiency arguments might justify refusing to find liability under the first test." Boise Cascade Corp., 107 FTC 76, 103 (1986).

OFFICE OF
THE COMMISSIONER

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

July 27, 1989

Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
Committee on Commerce, Science
and Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Chairman Bryan:

This letter elaborates upon my views regarding the follow-up question about agency resources that you asked subsequent to the Federal Trade Commission ("Commission" or "FTC") reauthorization hearings. Speaking for myself, I fear that the Commission now has inadequate resources to fulfill vigorously the agency's statutory missions.

Others have reached a similar conclusion. Groups as different as Consumers Union on the one hand, and the Association of National Advertisers on the other hand, have testified before you that the FTC is short-handed. In addition, the American Bar Association proclaimed recently in the Kirkpatrick Committee Report that "the current employee level is a cause for serious concern" and that "[t]he decline in real resources should be halted, and an increase in resources provided."

I have taken the liberty of enclosing two speeches of mine from the past few months that discuss this topic at greater length, and request that this letter and those speeches be included in the record. Thank you for your interest, and please let me know if I may be of any further assistance to you or the Subcommittee.

Sincerely yours,

Andy Strenio

Andrew J. Strenio, Jr.
Commissioner

Enclosures [1]

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[1] The enclosures were not reproducible and are in the Committee files.

Senator BRYAN. Thank you very much, Mr. Oliver.

Am I pronouncing it correctly? Is it Ms. Azcuenaga? Am I close?

Ms. AZCUENAGA. You're absolutely right, Mr. Chairman. Indeed, I was sitting here thinking after you said that, that I am now much more optimistic about this authorization bill, given the impressive ease with which you have handled the difficult task of pronouncing my name.

Senator BRYAN. Please proceed.

STATEMENT OF MARY L. AZCUENAGA, COMMISSIONER, FEDERAL TRADE COMMISSION

Ms. AZCUENAGA. Thank you, Mr. Chairman.

I am also happy to be here today and to give you my views on authorization legislation for the Federal Trade Commission.

I share the view that authorization is important to the Commission, both as a guide to the scope of its mandate, and as a manifestation of congressional support for the agency's role in protecting competition and consumers. I remain optimistic that the goal of authorization can be achieved in this Congress.

I generally support the testimony that has been submitted by Chairman Oliver on behalf of the Commission today. I would like, however, to address one issue from my own perspective.

On the subject of the Commission's program of competition and consumer advocacy, I agree with the Commission's testimony that the 60-day notification approach does not appear to be workable. More important, it does not appear to address what I believe this committee and others in the Congress may see, and what I see, as the principal difficulties with the program.

Properly conducted, the Commission's advocacy program fulfills the Commission's historic function to provide to the President, the Congress and the public, the benefits of its expertise in antitrust and consumer protection law, and in economic analysis of the functioning of the free market.

This function was a major reason for the creation of the Commission in 1914, as evidenced by section 6(f) of the FTC Act. On occasion, however, the Commission's advocacy projects have lacked objectivity and an adequately substantially empirical basis. And sometimes they have adopted a patronizing tone that is inappropriate.

The Commission's role should be to advise, not admonish; to elucidate, not preach; to advocate, not politicize. These problems can and should be solved within the Commission. We have made efforts to improve the program, although I believe that more can be done.

If Congress considers it necessary or desirable to impose some limitation on this program, I suggest an approach different from that contained in S. 677. I would support legislation that would preclude the Commission or its staff from offering comments on state or local legislative proposals unless: Number one, we receive a written invitation to comment that has not been solicited; two, the statement is within the Commission's area of expertise—that is antitrust and consumer protection law and policy; and three, the statement is objective and balanced.

The legislation also could require that, consistent with current practice, copies of all statements be furnished to the appropriate committees of Congress. Such legislation would serve as a constant reminder of what I believe are the fundamental components of a responsible and effective competition and consumer advocacy program.

It also would provide Congress with the means of assessing the program to decide if additional guidance is necessary or desirable.

Finally, it would avoid what I see as the inevitable result of enactment of provisions like those presented in earlier bills—the crippling of the advocacy process and the demise of the program.

Again, I appreciate this opportunity to appear and testify before the committee. If you have questions or if I may assist you in any way in the authorization process, of course I would be more than happy to do so.

Thank you.

Senator BRYAN. Thank you very much for your testimony. We will get to questions in just a moment.

Next, we will hear from Mr. Strenio.

Good morning.

STATEMENT OF ANDREW J. STRENIO, JR., COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. STRENIO. Good morning, Mr. Chairman and members of the subcommittee. I am pleased to submit my views regarding reauthorization of the Federal Trade Commission.

For the most part, I agree with the positions presented in the Commission statement. And, as a general matter also, I am very sympathetic to the opposition Chairman Oliver has expressed this morning to special interest provisions. In particular, I strongly support passage of new authorization legislation, bearing in mind, as you have pointed out, Mr. Chairman, that the last reauthorization expired almost seven years ago on September 30, 1982.

The reauthorization bills proposed over the past few years, such as S. 677, represent a variety of perspectives about the FTC. No doubt, the enactment of any reauthorization legislation at this point will require a certain amount of give and take on the part of all concerned. However, I believe that the enactment of a judicious compromise would be better than continuation of the current impasse.

Now, rather than repeat the discussion contained in the Commission's statement, I would like to highlight briefly my views on two related issues.

The first issue concerns Commission resources. What began roughly a decade ago as a healthy diet for the agency has degenerated since fiscal year 1987 to the condition of institutional anorexia.

Several statistics illustrate this point. Back in fiscal year 1979, the FTC had 1,746 work years for all of its functions. Maybe that was too many. But that number was pared back significantly. As late as fiscal year 1986, the FTC still had a respectable 1,107 work years. Shortly thereafter, the bottom dropped out and the agency fell to 980 work years by fiscal year 1988. Then, in fiscal year 1989, the agency was required to drop to some 900 work years when Congress reduced the Administration's budget request. In order to meet that level, 34 valued agency employees were RIFed (which, as you know, is the government euphemism for laid off) in January of this year. The involuntary loss of these 34 individuals aggravated the resource squeeze and shook the morale of the survivors at the agency.

Those survivors are part of a dwindling band. The FTC now has fewer employees than at any time since fiscal year 1961, when it had 855. Of course, in the time since then, the gross national product has grown from roughly half a trillion dollars to $4.5 trillion dollars. When inflation is taken into account, the GNP is 240 percent of what it was in 1961. But, the agency with major federal responsibility for policing a surge in mergers and the primary federal responsibility for keeping advertising honest has been left far behind. Just to put this in context, consider that the annual number of merger transactions has skyrocketed from 861 in fiscal year 1979 to a projected 2,878 in fiscal year 1989. That is a jump of some 330 percent, while agency work years virtually have been cut in half.

As this disparity between rising FTC workload and plummeting FTC work years grows more severe, the agency's track record could shift from gangbusters to ghostbusters.

I am not alone in expressing concern about the Commission's plight. The American Bar Association's Section on Antitrust Law, from which you will be hearing later, recently released a report regarding the FTC.[1] This report concludes that the decline in agency resources, indeed, is a serious matter. Specifically, the report states, and I quote, "The Commission needs a stable environment in which to pursue its mission, and the budget problems of recent years, with the resulting reductions in force, have not provided that environment. The decline in real resources should be halted and an increase in resources provided."[2]

I wholeheartedly concur in that statement. In short, there is only so much that can be done by so few. If the FTC is to fulfill its statutory responsibilities, the agency must receive adequate resources. Otherwise, in the final analysis, it is the public that gets shortchanged.

The second issue I would like to discuss involves the Commission's Consumer and Competition Advocacy Program. This program traces its roots back to the very beginning of the Commission's history. Through the program, the FTC shares with other governmental agencies its expertise on competitive issues that vitally affect consumers.

The program thus provides substantial public benefit by suggesting innovative approaches that would allow governmental bodies to achieve their objectives at the lowest cost to consumers, or with the least risk to vigorous competition. In my experience with the program (both as its director from 1982 through 1984, and as a commissioner since 1986), the FTC frequently has been the sole advocate of consumers' interests in particular matters.

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[1] Report of the American Bar Association Section on Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 56 Antitrust and Trade Regulation Report S-8 (Supplement, April 6, 1989).

[2] *Id. at S-28.*

S.677 would require the Commission, prior to participating in the proceedings of any federal or state or local agency, to provide Congress with sixty-days advance notice (or as soon as practicable). But if experience proves any guide, advance notice—especially sixty-days prior to participating—is unlikely to be practicable in a great many instances.

If experience proves any guide, advance notice—especially sixty days prior to participating—is unlikely to be practicable in a great many instances. First, the Commission does not authorize any participation prior to reviewing final proposed staff comments. It is extremely rare for comments to be authorized more than a day or two before the filing deadline. Second, it also is common for there to be far fewer than sixty days between the date staff receive an initial request for FTC comments and the deadline for receipt of those comments.

The Senate version of S.677 does try to take these difficulties into account through its "where practicable" language. However, there are preferable alternatives, such as simply having the FTC staff provide a final version of comments to the relevant committees as soon as the Commission authorizes a filing. I understand that the Commission currently provides Congress with copies of all comments on a comparable basis. I think this is a worthwhile procedure, and hope the Subcommittee will consider adopting this approach.

In conclusion, the job of the FTC is to protect consumers by fostering a competitive marketplace free of unfairness or deception. The agency should not cavalierly interfere with the workings of the market. However, in those instances where the market fails and FTC intervention would not be counterproductive, the Commission should take vigorous action to correct the market failure and to prevent recurrence of the unlawful activity.

I remain committed to the conscientious pursuit of these objectives. I hope that a new reauthorization will be enacted soon in order to give the FTC the benefit of detailed Congressional guidance on how best to perform our duties, and to reaffirm the importance attached to this work.

This completes my statement. I would be happy to answer any questions you may have. And I would ask, Mr. Chairman, that my written statement be accepted for the record at this time.

Thank you.

Senator Bryan. Thank you very much, Mr. Strenio. Your written statement will be included in the record.

We have been joined by a former chairman of the subcommittee, Senator Kasten. Before we get to our round of questions, let me yield to him, if he would like to make an opening statement.

OPENING STATEMENT BY SENATOR KASTEN

Senator Kasten. Mr. Chairman, first of all, thank you very much. I notice that Chairman Oliver is here, and I want to thank and congratulate him on a wonderful job. It has been a pleasure working with you in all sorts of different capacities.

You are right, Mr. Chairman, I have a little experience on the FTC reauthorization bill. And I might say to you that it is a real challenge.

I also would like to point out that, although you might not be aware of the significance of the election that was held in New Jersey yesterday, the fact that there might be changes in the House of Representatives on this issue gives us a real opportunity to move a bill.

In the past, both the Senate and the House have enacted their own reauthorization bills. Several issues, including advertising rulemaking—and I see we have some representatives of the advertising industry here today—and other issues, prevented a reauthorization bill.

From time to time, this bill has become the vehicle for the legislative veto battle, which is one that we may or may not be able to get resolved. We had a tentative compromise on that in the past. As a result, I think today's hearing is very important, and it's a stepping-off place from which I hope that you and all of us on this committee can move to put together a bill that will pass not only the committee, but the full Senate as well.

Working with Chairman Oliver and those on the panel we will start to frame these issues today. I compliment you on scheduling this hearing—I believe two hearings—on the FTC. And if we can move quickly, I think there is a real chance that we can enact an FTC reauthorization bill; and enact it in this calendar year. It would be my hope that we could pass an FTC reauthorization bill in September or October. And I think there is a real chance and a possibility of doing that, with the help and cooperation of some of the people that are appearing before us today.

I look forward to working with you, Mr. Chairman, and I, once more, congratulate Chairman Oliver on his work at the FTC.

Senator **Bryan**. Thank you very much, Senator Kasten. We look forward to working together, as you suggest, to get this piece of legislation processed promptly and to end the seven-year drought, and finally get something on the books.

We have been joined by the ranking member of the subcommittee, my friend, Senator Gorton.

Senator.

OPENING STATEMENT BY SENATOR GORTON

Senator **Gorton**. Thank you, Mr. Chairman. I think it is most important that we hold these two days of hearings on the Federal Trade Commission. As has already been pointed out, the Commission has not been authorized since 1982. I believe that FTC legislation should be a priority not only for the subcommittee, but for the full committee and for the Congress as a whole.

The American Bar Association has recently published a thoughtful and comprehensive report on the FTC. The ABA committee's findings and recommendations merit the careful attention of the subcommittee. And I will be interested to learn of the FTC's reaction to the report.

There continues to be controversy over the authority of state attorneys general who assume a portion of the FTC's consumer protection jurisdiction. As a former state attorney general, I recognize that the states may want to get involved in this area. The FTC, on the other hand, may oppose such an arrangement, which could lead to uneven application of the FTC Act. I look forward to hearing more on this difficult issue.

Again, Mr. Chairman, thank you for holding these hearings. I look forward to the testimony. And I am pleased that each of the witnesses has seen fit to appear before us.

Senator BRYAN. Thank you very much, Senator Gorton.

One of the issues that has confronted the states and my State of Nevada in particular, has been the issue of telemarketing fraud. A number of these boiler-room operations grew rapidly and the states have been grappling with them.

In our own state we have reduced the number from 200 to about 50 over the last year, too, and the question that I would have to each of the members of the panel—and I would begin with you, Mr. Oliver—is, would you assess the efforts of the FTC in this area? What have you accomplished? What needs to be done?

Mr. OLIVER. Yes, I would be delighted to, Mr. Chairman. One major step the FTC has taken, though it may not appear to be major because it did not cost a lot of money, was to institute a telemarketing data bank.

The data bank contains information that apparently previously used to be kept by several law enforcement agencies, primarily state attorneys general, in shoe boxes or other such containers and now is essentially logged into a computer that the FTC maintains.

The result is that information regarding these people from around the country is kept—is entered into the data bank and can be retrieved by the appropriate law enforcement officials. It is hard to tell whether that is the major step, but it seems to me that is a very significant step that has enabled law enforcement officials to have knowledge about names, places, activities and prosecutions that relate to telemarketing.

The FTC has worked closely with state attorneys general to prosecute and investigate telemarketing activities, so we have taken it very seriously. We spend a lot of time on it. I guess I think that has certainly helped alleviate the problem, although in the age of the telecommunications revolution telemarketing fraud is big business.

Senator BRYAN. Are you convinced that we need not do anything further at the Federal level, or are there some additional tools that would be helpful?

Mr. OLIVER. No, I think some additional tools would be helpful and as you know, Senator McCain last year introduced a bill making—or suggesting some changes that we find very positive. One was to allow us to have authorities to sue multiple defendants in a variety of jurisdictions.

One of the problems with telemarketing is that it covers a variety of jurisdictions and people tend to move quickly. If we could have that additional power, we think that would be useful.

In addition, we think that it would be useful to amend the Right to Financial Privacy Act, which would allow us to delay giving notice to these people and that would allow us to allow the FTC to proceed without informing them prematurely of what we intended to do.

That bill also would allow us to amend the U.S. mail—U.S. Postal Service regulations to allow us to use mail covers, which is another tool that law enforcement believes would be useful.

Senator BRYAN. Mr. Oliver, I am sure that Senator McCain will probably have further questions when he gets an opportunity to question, but if we could have the benefit of your thoughts and your colleagues on the Commission as to where you think we could be helpful from a Federal perspective I would appreciate that, and I think other members of the Subcommittee would. Ms. Azcuenaga, do you have any additional comments?

Ms. AZCUENAGA. Possibly repetitive of some of Chairman Oliver's. I certainly recognize an acute need for a strong Commission enforcement presence in the area of telemarketing and as you know, that is an extremely serious national problem.

The Commission has devoted an increasing amount of resources to the problem of telemarketing fraud, and with the help of the state attorneys general and other Federal, state and local law enforcement officials we have shut down a number of fraudulent schemes, but despite our very best efforts daily new con artists pop up so it is a continuing problem.

We have commented on various bills two of which were introduced by members of this subcommittee, and remain interested in working with you. Some of the tools that Chairman Oliver has mentioned would be useful to us and I support the letters that we have submitted in the past and will be delighted to continue to work with you on this important area.

Senator BRYAN. Mr. Strenio, do you have a comment?

Mr. STRENIO. Yes, Mr. Chairman. I certainly think that this continues to be a very severe problem. Indeed, it is a growing problem, and it has been a subject of considerable frustration on the part of the Commission. We have succeeded, through hard work and the dedicated efforts of our staff members, in obtaining judgments against and injunctions against a number of con artists engaged in this activity.

Unfortunately, what we have been able to do with our limited resources amounts literally to a drop in the bucket in terms of the total amount of fraud that is going on. We very often, even when we are able to get all the way through and successfully prosecute someone, we are fortunate to get 10 or 15 cents back on the dollar. So that is a real problem.

We also have, as Chairman Oliver started to enumerate, made a number of proposals for specific legislative changes that will give us greater ability to cope with these crooks and I would be very happy to work with my colleagues in sending those up for the entire Committee.

Senator BRYAN. We would appreciate any of your comments that you would send to the subcommittee.

Before the red light flashes, let me ask one other question that has evoked national concern and that is the rapidly escalating price of gasoline.

Many would say there is a correlation between the environmental tragedy that occurred on Prince William Sound on April 24 and what has been characterized by at least one industry trade publication as the largest and quickest run-up in the history of American petroleum marketing.

There are many out there in my own state, and I am sure across the country, who believe that there is some nexus between that unfortunate environmental occurrence and the rapid run-up of prices.

I know the attorneys general have been involved in this issue. I believe the Attorney General from Oregon has led a group that has addressed an inquiry to the Commission. If we might get a response in terms of what you have found and what you are doing and what recommendations, if any, you have made, please.

Mr. OLIVER. Mr. Chairman, I would be happy to respond to that. I have sent letters to the several attorneys general who have written to us, and I would be happy to send you a copy of one of those letters and make it part of the record.

Essentially what we said is that we monitor the industry on a somewhat on-going basis, but have not ourselves found any evidence of collusive activity in connection with raising gasoline prices.

If we did find such activity we would refer it right away to the Justice Department, because as you know the Federal Trade Commission does not have criminal jurisdiction so although it is true that we, as opposed to the Justice Department, essentially monitor the oil industry, if we found collusive activity or suggestions of collusive activity, that would be something we would refer to the Justice Department.

As to why the prices have gone up, I do not believe we can fully answer that. There are, I believe, some indications that prices of crude oil were rising anyway and that there were industry predictions that the price would rise at this time of year and so that in that sense, that rise is coincidental.

Whether that fully explains it, I do not think we would be prepared to say. But certainly we do monitor the industry and if we find evidence of collusive activity we would refer that to the Justice Department.

Senator BRYAN. If my colleagues will indulge me just one more question—my time has expired. But have you completed your inquiry, Mr. Oliver?

Clearly, if there is an anticompetitive practice that is occurring we need to take action and there is just marked skepticism on the part of the American public in terms of the timing of those relationships.

Maybe, as you are suggesting, there are other market factors, but can you share with the Subcommittee at this point, have you completed your investigation? What, if anything, do you intend to do beyond what your preliminary indications are?

Mr. OLIVER. No, I think we have not completed it, but I guess I would describe it less as an investigation than as simply monitoring and looking at the problem. Investigation may be a term of art. We continue to monitor the problem but, as I say, have found no indication.

Senator BRYAN. Can you give us a time frame of when you might have been able to complete your investigation?

Mr. **Oliver**. We will just continue watching it until or unless, or even beyond the time when we would find something.

Senator **Bryan**. Well, we would appreciate, you know, at least a periodic update because this is something that is of concern to me and I am sure to other members of the Subcommittee.

Let me now yield to Senator Gorton for questions.

Senator **Gorton**. I will yield and turn to the two who were ahead of me.

Senator **Bryan**. All right. Senator McCain, you get the promptness award. Let me yield to you.

Senator **McCain**. Thank you, Mr. Chairman, and again, thank you for being here today. I have enjoyed our relationship in the past and I look forward to working with you in the future.

I would like to return to this issue of consumer fraud. I intend to reintroduce legislation I introduced last year, sometime in the next week or so. I would like to just get some broad parameters, if I could.

Chairman Oliver, we are talking about consumer fraud. What kind of numbers are we talking about, roughly? Are we talking about billions of dollars a year?

Mr. **Oliver**. Do you mean in telemarketing fraud, or all fraud?

Senator **McCain**. Health fraud, telemarketing and life care.

Mr. **Oliver**. It must be billions. I do not believe we have a number.

Senator **McCain**. Is it your opinion that telemarketing fraud is on the increase?

Mr. **Oliver**. I would think that is probably true. Certainly, it has grown enormously in the past years. Whether it is currently on the increase I do not believe we know, but it certainly has grown enormously and it very likely still is.

Senator **McCain**. How about health care fraud?

Mr. **Oliver**. I do not know the answer to that. We have paid a lot of attention to health care issues, because as we have said that is where the money is.

The country spends a lot of—something like 10 percent of its GNP on health care, so we devote a lot of attention to health care practices. Whether it is on the increase I do not believe I know.

Senator **McCain**. What about this life care industry fraud? Do you think that is increasing or decreasing?

Mr. **Oliver**. I do not know the answer to that. I just do not know. Maybe the staff knows. Those things are big business and we worry about them.

Senator **McCain**. Besides the provisions that you outlined to the Chairman, would you care to mention any additional tools that you believe the FTC needs, to address this issue of consumer fraud? The other Commissioner may respond also, if they wish.

Mr. **Oliver**. Two other aspects of your bill that I believe we commented on before, last year, were allowing us to use civil demands for physical evidence in addition to testimony and that would be particularly useful in cases of coin fraud, things like that, where we can get the physical evidence which we have a problem getting now.

Another one was to deputize attorneys general to handle cases. We think that provision would be useful, too. So those were five particular provisions in your bill that we thought would be useful to us in combating this kind of fraud.

Mr. STRENIO. Senator, if I might add, there are two other items that I think would be of use. One would be a clarification that the FTC has authority to obtain consumer redress in administrative actions brought under Section 5, which would be a reversal of the Heater decision and secondly——

Senator McCAIN. Give me an example, a case.

Mr. STRENIO. Well, I think I would want to keep it in the hypothetical. So the situation we face now is a very tortured one, where if we bring a case under Section 5 and we start an administrative action and we go all the way to the end of that action, if we find liability we may then still have to start the ball rolling all over again in a Federal court appeal.

If at the end of that appeal, our liability determination is upheld, then under our existing legislation we have to go and start all over again in an attempt to secure consumer relief. It would be a lot faster and I think a lot more desirable if we were able to do that through the administrative process directly, rather than at the tail end.

A second area would be amending Section 5(m)(1) in order to get—in order for the Commission to be able to get civil penalties where a Section 13(b) injunction has already been obtained.

Third, of course, to the extent that the Commission has more ample resources, they could be dedicated specifically to putting together more investigative teams to target this area.

Those would all be extremely useful, I think.

Senator McCAIN. Ms. Azcuenaga, would you care to make any additional comments?

Ms. AZCUENAGA. Thank you, Senator McCain, but I think that it has been covered both in the testimony here today and in the letters that we have submitted on the specific bills and I have nothing further to add.

Senator McCAIN. Part of the problem too, Chairman Oliver, as you have stated, is that the reductions in your budget have obviously had an impact on your ability to pursue consumer fraud and other issues under your area of responsibility. Is that indeed the case?

Mr. OLIVER. I guess my feeling about our budget situation is it has stretched us. Certainly at headquarters here in Washington the budget restrictions have stretched us, but I am not convinced that we are not doing things that we would not otherwise be doing if we had a lot more money.

One always does more with more money, but I am not sure that you could you could point to specific areas that we are simply not worrying about because we do not have additional funds. Certainly the staff at headquarters works very hard and I would not want to see them have to work any harder.

Senator McCAIN. Did the fact that the FTC has not been reauthorized in seven years have any impact on you directly?

Mr. OLIVER. Senator, I guess I was hoping you would not ask that question. I think I would be less than candid if I did not say that I do not believe it really has affected our day-to-day operations.

I do not know whether I would describe authorization as a formality and I would not want to be derogatory and that is why I wish you had not asked the question, but I do not believe, if you ask the folks in the elevator whether they are working in the halls or at their offices whether they were really suffering——

Senator McCAIN. In other words, there is no sign at the FTC that says, reauthorize me?

Mr. OLIVER. There is nobody that says that it is just awful. I think the answer is that it probably, in that sense, does not affect the day-to-day operations of the FTC.

Senator McCAIN. But it does affect, to some degree, your influence?

Mr. OLIVER. I know you would like me to answer that question and say, yes. I do not know the answer to that. That is why I wish you had not asked the question.

Senator McCAIN. Fine. Thank you, Mr. Chairman.

Ms. AZCUENAGA. May I add to that?

Senator BRYAN. Certainly.

Ms. AZCUENAGA. I have to take a slightly different view. We certainly have learned to live with a lack of reauthorization and I do not think that it is a very difficult thing to live with, but I do think it is important to know what the Congress thinks, and questions sometimes do arise over issues that may have been subjects of debate at the last authorization hearings—questions like "are you sure that the Congress is really behind you in a particular approach?" I think it genuinely would be useful, albeit in an intangible way, to have a reauthorization bill.

Mr. STRENIO. Senator, if I might just add my agreement with Commissioner Azcuenaga's perspective on reauthorization. Also, since I see Senator McCain's time is up I will not go into it now, but I see a number of areas where the budget restrictions in fact limit our ability to pursue worthwhile cases or activities such as the fight against telemarketing fraud.

Senator BRYAN. We may be able to get to some of those in the next round of questions, Mr. Strenio.

Let me now call upon Senator Kasten. Thank you, Senator McCain.

Senator KASTEN. Mr. Chairman, thank you. I just want to say that I think reauthorization is important. I understand that the elevator still goes up and down and the rooms still get cleaned, but I think it is important that this agency be reauthorized. I think it is important from the perspective of the Congress, probably more important than it is from the Commission's.

We have a responsibility to reauthorize and in the process of reauthorizing, review the activities of the Commission. From time to time things change.

We in the Senate worked out things having to do with agricultural cooperatives, for example. We worked out a number of other changes in the reauthorization bills that we came forward with. The same happened in the House.

Unfortunately we got hung up on a couple of issues and the whole thing collapsed. The work during the reauthorization process and the conference is important for the Congress. It is important for you also, but it is through the reauthorization process that we influence the agency.

We can appropriate and through the appropriations process we can keep the elevators running and keep people on the payroll. But in terms of our influence, a number of us felt that under Michael Pertschuk in the 1970's, the FTC over-regulated. The Congress pulled back from that position and now we are seeking a balance and the act of reauthorization is the process whereby we direct this agency. I think it is important that we go forward and work hard to get a bill.

I notice, Mr. Chairman, in your statement you talked about a number of complaints against a number of different companies with regard to advertising. Campbell's Soup, Kraft, Norelco, R. J. Reynolds, General Nutrition, Sunbeam—you have got a whole list here.

Since 1981 or 1980 you have been prohibited from rule-making proceedings based on unfairness. You have been working with case by case issues dealing with false and deceptive advertising. You have now had a lot of experience—you list eight or 10 different companies.

Have you been restricted in this area? False and deceptive versus unfair and case by case versus rule-making have been, Mr. Chairman, unfortunately included in appropriations bills in the past because we have been unable to get it reauthorized.

This is no longer an issue in the Senate.

You have been operating now under this kind of basic guideline, which was a compromise that we worked worked out with Senator Packwood, Senator Danforth and others in 1980.

In the effort that you have made dealing with the companies that you have listed, have you—have there been times in which you have said, these restrictions prohibit us from doing what we really think we ought to be doing with regard to this particular ad, or this particular company, or this particular kind of advertising, or has—the compromise that we have worked out with regard to deception and unfairness worked out reasonably well? Do we have now a framework in which we can operate?

Mr. **Oliver**. I think it is correct, Senator Kasten, to say that the framework we have works, that we would not—at least, I cannot think of in any case that I have been involved in that we wished we had had rule-making authority, that we would have engaged in rule-making.

The cases we brought really tend to be fact-specific. Indeed, probably in most cases, whether it is advertising or something else, the cases we bring are fact-specific and I think the FTC has found over a decade or more, on a variety of issues, that rule-making is a cumbersome way to proceed.

That does not mean we never do rule-making, but it is just a very cumbersome way to proceed in this area or any other area. These cases tend to be fact-specific and also when you bring a case against one person, certainly in the advertising industry and also, I think probably most other industries, the industry reads the case and although it does not have the legal effect of rule-making, it has an influential effect. It amounts to the same thing and so I do not believe it is fair to say we have been disadvantaged by any prohibition.

If I could make two other comments. One is, thank you for your kind comments at the beginning of the hearing. I certainly have enjoyed working with you.

Also, in the case of reauthorization I do not think I disagree with any of the comments. I simply am saying in my own defense that that was not the question Senator McCain asked.

Senator KASTEN. I was not disagreeing with you. I am just giving you the perspective from our side of the table.

Would you agree that the framework that we have now with deception and unfairness and case by case versus rule making is a workable one?

Ms. AZCUENAGA. Senator Kasten, I think that is precisely one of the reasons why we need an authorization bill.

We, of course, are aware of the bills and compromises that have been reached on the Hill, but those are not law, and we are operating under——

Senator KASTEN. No, it is not quite true. They are law because they are included in the appropriations bill, but they are not permanent law.

Ms. AZCUENAGA. I am sorry, that is, of course, what I meant. I certainly should not have said it that way, especially in this room, and I misspoke.

Senator KASTEN. You should not say that in the Appropriations Committee room.

Ms. AZCUENAGA. But it is not the authorization clarification that I think we need. And, to that extent, it is a question in my mind, you know, in terms of long range planning for the Commission.

And so I think it would be very useful to clarify those things in an authorization bill.

Senator KASTEN. But with regard to my specific question, the compromise that we have crafted, notwithstanding the fact that it has been included in the appropriations bill with regard to deception, unfairness, rule making, case by case, that seems to be working relatively well. Is that what you are saying to me?

Ms. AZCUENAGA. I think it is adequate.

Senator KASTEN. Do you have any comment?

Mr. STRENIO. Senator, I would say that as a practical matter I cannot see any tangible difference in what the Commission has done or would have done in this past interval.

Nonetheless, I agree with the philosophical point raised earlier in Chairman Oliver's testimony that it is a matter of general concern when you start carving out exceptions, because at some point you could have a circumstance arise where there would be a valid rulemaking that is precluded.

But I could not say that to date there is a difference in how the Commission would have acted.

Senator KASTEN. The other issue that was troubling at that point, and I apologize for going over my time, was the whole question about the unconstitutional prohibition of free speech which bubbles into this whole argument all the time, and that is really why we carved it out the way we did, and I just want to be sure that it is working.

Thank you, Mr. Chairman. I apologize for going over my time.

Senator **Bryan**. Senator Gorton.

Senator **Gorton**. Chairman Oliver, I was delighted at your very candid answer to Senator McCain. That was going to be my first question.

At the same time I want to echo the views that Senator Kasten has expressed.

I think it is at least as important for us as it is for you that this commission and other similar organizations be reauthorized and that Congress pay attention to their very important roles and create long-term policies rather than short-term annual policies created in appropriations bills. And so I hope that this process is successful.

I would like to start, Mr. Chairman, by asking you to give me a brief analysis of the American Bar Association review of the activities, powers, and directions of the Federal Trade Commission.

Are any of the comments which they have made particularly good? Are any of them really off base in your opinion?

Mr. **Oliver**. Senator Gorton, I have read the report for a while now. I went through it when it came out, and it struck me as being—I want to be careful—as not sensational.

It commented on what we did. It did not really find an awful lot that was wrong. It did not really recommend any major changes, as I thought it might have.

I mean, it might have said that there should not be dual enforcement of the antitrust laws.

They did not say that. It might have said there should not be an FTC. It did not say that.

It might have said a lot of things that it did not say and my own sense of going through it was that it was sort of the dog that did not bark.

I do not mean to be unkind to the ABA or in any sense derogatory to members who put it together or to the commission.

It was a review, but it struck me as being surprising—not surprisingly, but favorable and noncontroversial.

I guess I had expected maybe, and that is my nature—I had expected it to sort of zero in on, I do not know, three or four practices and say gosh, these really need to be changed, and these are major changes that should be effected. But it simply did not do that.

Mr. **Strenio**. Senator, if I might add, I would say that I consider that Report to be an extremely constructive document that I trust will be very useful in terms of the review of the Commission's activities.

And just very briefly but specifically, things that are cited in that document that I consider especially important include reaffirmation of the value of the work that the Commission does; the acknowledgment that the resource hemorrhage has gone too far, and that there must be a reversal of that trend; the support expressed for the continuation of the Advocacy Program; the importance of economic analysis in analyzing our cases; the suggestion that we should be exploring some cases in the very difficult areas of antitrust law and the deregulated industries and in terms of state action and other issues, and, finally, the suggestion that we at the

Commission should work harder to do a better job of explaining our approach with regard to the regulation of advertising.

The only area that I would quibble with the Report to a certain extent is the suggestion that the Commission has overinvested in regional offices as opposed to headquarters staff levels. I believe that a different conclusion is warranted. But unless you are interested in pursuing that, in the interests of time, I will leave that for another day.

Ms. AZCUENAGA. Senator Gorton, I would like to start by saying I agree that the ABA Kirkpatrick report is a thoughtful, comprehensive, constructive, and highly useful document.

I think probably for the public, but particularly for us, it gives us a wonderful opportunity to reexamine what we are doing and think through some of the important things that underlie the work that we do.

As someone who has been associated with the Commission for a long, long time, I have a very definite opinion about almost every sentence in the report. I will not burden you with that, but you have asked for things that I generally agree with and possible things that might have been addressed more fully—where there might have been more.

I was very gratified to see the support for many of our existing programs.

For example, the great deal of work that we are now doing in Federal District Court in the consumer protection area, a lot of which used to be done before administrative law judges.

Just to cite one other example, I was very gratified to see the support for our competition and consumer advocacy program. I think there is far more in the report that I am pleased with than not.

I was somewhat disappointed that it did not address the touchy issue of the extent to which politics may intrude on the processes of the Commission.

One other point that I would mention is that they do address the question of giving information to Congress, and I simply cannot agree with any suggestions that we just say no when the Congress wants information.

I believe that in 99.5 percent——

Senator GORTON. I think that is a very wise decision.

Ms. AZCUENAGA. I think almost always we can readily respond to official congressional requests for information, and where we may have disagreements over the scope of such requests, I think that by working together we can, and I have never seen a situation in which it was not possible to, provide for the needs of the Congress and protect the law enforcement and deliberative processes of the Commission.

Senator GORTON. One more question. You, at least officially, have not protested against budget constraints. A budget freeze really means a budget cut of some personnel, at least.

Do you feel, any or all of you, that given budget constraints and given what you are likely to have in the next few years, you might well administer the Federal Trade Commission from the top as well with three commissioners as with five?

Mr. OLIVER. I guess I do not have an answer to that question.

It seems to me that that is not where the money comes from or where the savings would come from. You would certainly eliminate some salaries, but I do not believe you would get big money out of cutting the number of commissioners. So that if you were looking for a way of economizing, I think I would do it differently.

If you were looking for a way to restructure the agency, you might cut it down to three, although that might produce quorum problems and thereby present difficulties. And so I think I probably would not pick that way of economizing first.

Ms. AZCUENAGA. I do not have a strong feeling either way. I do not think that a case has been made for reducing it to three.

On the other hand, I do not know that a case could be made if we were three to increase it to five.

I agree that the resources are not at the level of the commission, and by having five commissioners, you do not have greater resources for administration.

The only greater resources you have are for advisers in each commissioner's office because administration is centralized. But I do not feel strongly about it.

Mr. STRENIO. Just very briefly, I agree that cuts there, that the savings would be relatively de minimis, and you might have quorum problems. Still, philosophically, there is no reason that the Commission could not go down to three. In light of the budget situation I am curious, though, Senator, which three commissioners do you have in mind?

Mr. OLIVER. I will volunteer.

I might also make one follow-up comment on the ABA report.

One has to remember that the first Kirkpatrick Commission report that came out, what was it, 20 years ago, landed like a bombshell in the FTC, and it was a hot document.

And I think there was some expectation this time around that with Miles Kirkpatrick running it again and it being a repeat that it might have sort of had that same—not necessarily the same effect, but a similar effect, and similar sharp comments.

And my point was that it did not have those comments, and so in that sense it was not like the commission's report of 20 years ago.

Senator GORTON. Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator Gorton.

I must say, Ms. Azcuenaga, I am intrigued by your suggestion that perhaps the report did not, in your opinion, address adequately the extent to which politics affected the process.

If I might ask you to amplify on that for a moment, I am not sure precisely what you reference is there.

Mr. OLIVER. May I say that I am glad that you asked that question.

Ms. AZCUENAGA. There has been a great deal of discussion about a number of issues.

And I do not mean to suggest by any means that politics has influenced any particular decision, but there are issues such as the length of the terms of commissioners, and there have always been raging debates about the independence of the Commission.

There are always questions about the extent to which our independent roles in certain areas relate to the three-branch organization of the government. Since we are quasi legislative, quasi judicial and quasi executive, various philosophical questions may arise concerning exercise of our responsibilities in these areas.

I do not mean to suggest anything improper, just that it is an interesting subject that many people have raised, and if any group could think about that in a disciplined and objective way, I would think it would be the ABA.

Senator **BRYAN**. Yours was more of a philosophical analysis that you were seeking from the report in terms of where you fit into the political perspective of quasi judicial, quasi administrative, that type of thing, as opposed to a particular event or activity that is alleged to have occurred?

Ms. **AZCUENAGA**. Yes, Mr. Chairman.

Senator **BRYAN**. Chairman Oliver.

Mr. **OLIVER**. Mr. Chairman, may I interrupt you.

In a sense that is what I meant, too, that there have been concerns.

We are aware in a single case that we might wear three hats. And it did not say this is terrible and the FTC ought to be shut down because, and that is the kind of thing that I meant, that I really thought they might address that kind of problem.

And, in that sense, not having addressed that issue, the Kirkpatrick report struck me as being not as exciting as it might have been.

Senator **BRYAN**. Chairman Oliver, I have a question.

Like the ranking member, Senator Gorton, I, too, once served as an attorney general, and I want to ask a question about the relationship as you see it between the commission and the attorneys general across the country.

In a speech earlier this year to the antitrust division of the American Bar Association you are quoted as describing the attorneys general as "antitrust counterrevolutionaries."

I have been in public life long enough to know that not everything that is recorded or printed is, in fact, accurate in terms of what one actually said or intended, but I guess the question that I would ask is that some have criticized the commission for lack of action and have indicated that the attorneys general have, in effect, filled or occupied a gap that has occurred or a vacuum by reason of nonaction.

And, indeed, the attorneys general have played a positive role.

Could you respond as to what you meant and the relationship as you contemplate it between the attorneys general and the commission?

Mr. **OLIVER**. Yes, Mr. Chairman, and certainly some people have criticized the commission's activities or, if you like, lack of activity over the last eight years essentially during the Reagan administration.

What is interesting, I think, about that criticism—and I have made this point a number of times—is that there is not very much of it.

There is some, but there is not a lot, and I think that in itself is probably significant.

My response to the criticism has been essentially this. During the Reagan administration—and continuing in the Bush administration—talking about that eight-year period—there was something like, oh, 7,000 mergers that took place in the country, give or take.

Now, the FTC's and the Justice Department's responsibility in investigating and evaluating merger is to look at the merger and look at the facts and then look forward and make a prediction, a guess if you will, as to whether prices will go up as a consequence of that merger. And then, depending upon what they decide, they decide to challenge the merger or not challenge it.

The critics on the other hand have only to look back at the record at those mergers that took place and see whether or not in the ensuing two years say prices did, in fact, go up.

And my challenge has been to our critics, my challenge has been to look at those 7,000 mergers and find some that the Justice Department or the FTC, using the guidelines, did not challenge where prices went up.

And, to date, nobody has provided me with a list of cases where the Justice Department guidelines were applied by the Justice Department and the FTC and, nevertheless, prices went up.

We have, in fact, investigated four, I think, or five cases which were controversial and where we were urged to block the mergers, but we did not and, in fact, prices, according to the Bureau of Labor Statistics, have gone down.

Senator BRYAN. Mr. Oliver, could you just comment in the very brief time that is remaining on the relationship between the attorneys general and the Commission.

That really was the basis of my question, because they are going to be here tomorrow, and we will ask them the same question.

Mr. OLIVER. Well, my comment basically said that when the attorneys general disagree with us and decide to bring a case that we did not bring, that they are in error. And that, in fact, our policy works, and their policies are wrong because I think our guidelines and our policies, as I indicated over the eight years have been exactly correct. Anybody who does not follow them is wrong.

Senator BRYAN. Senator Gorton.

Senator GORTON. No, thank you, Mr. Chairman.

Senator BRYAN. Thank you very much. We appreciate your testimony.

Our next panel this morning will consist of Mr. Steven Calkins, who is a professor of law at Wayne State University Law School in Detroit, Mr. Robert Pitofsky, Dean and Executive Vice President for Law Center Affairs at Georgetown University Law Center, and Mr. Timothy Muris, George Mason University Foundation, professor of law, George Mason University Law School.

Good morning, gentlemen. We will begin this panel, Mr. Calkins, with your testimony, please.

Mr. CALKINS. If it is all right with you, Mr. Chairman, could we start with Bob Pitofsky and let me bat cleanup.

Senator BRYAN.

Mr. Pitofsky, we will begin with you, then.

STATEMENT OF ROBERT PITOFSKY, DEAN AND EXECUTIVE VICE PRESIDENT FOR LAW CENTER AFFAIRS, GEORGETOWN UNIVERSITY LAW CENTER

Mr. Pitofsky. Thank you very much. I am delighted to be here and to report to the committee on the ABA Commission report on the Federal Trade Commission.

Let me start by saying that the ABA Commission report was prepared by an exceptional group of people with broad backgrounds in law, government, and academia. Interestingly, two of our 16 members were Attorney General William Webster of Missouri and Assistant Attorney General Mike Brockmeyer of Maryland. Thus, it was an unusual cast, not the typical group of practitioners that one might find preparing an ABA commission study.

It was also striking that this group, which is so varied in its political outlook, was able to reach such a remarkable consensus. With modest exceptions that really were not central to our mandate, we reached a solid consensus about the FTC.

We concluded that the FTC has a very useful role to play both in antitrust and consumer protection. In antitrust, we do not believe that the Commission has all that much of a role to play with respect to outright cartel behavior because that should be treated criminally. As a result, the Department of Justice should take the lead.

We certainly believe that the FTC should be active in its merger supervision and, interestingly, the group concluded that even beyond price fixing and merger regulation, there is a useful antitrust agenda for the FTC to pursue in the future.

In consumer protection we concluded that the agency has done some good work in the last ten years, but in advertising regulation, we noted that there appears to be a wide view that the Commission is not as active as it ought to be, especially with respect to national advertising.

While there may have been far too much rule making in the seventies, we think there are more targets for rule making in the eighties than the Commission seems to have found.

We applaud the Commission's efforts in the area of industry guidance. We think guides, advisory opinions and so forth are useful approaches, although the group sense was that those guides need to be followed up by cases if anyone is to take the Commission seriously.

We think the FTC staff may have been too large in the seventies, but we certainly feel it is too small now to carry out its mandate. We also believe that rather than quarreling with the states, the Commission ought to find a way to work with the states in a coordinated way to achieve mutual enforcement goals.

Finally, we did not recommend any major structural changes in the FTC, although we considered many.

I will add, in response to Chairman Oliver's earlier remarks, that it's true that ABA report is not a scathing denunciation of the FTC—we did not think we were in the business of writing a report card. Nevertheless, I believe the report recommends a set of activities for the Commission that would be much different than what the agency has been pursuing in recent years.

With that I will turn the microphone over to my colleagues.

STATEMENT OF TIMOTHY MURIS, GEORGE MASON UNIVERSITY FOUNDATION PROFESSOR OF LAW, GEORGE MASON UNIVERSITY LAW SCHOOL

Mr. MURIS. Mr. Chairman, I am Tim Muris and like the rest of the panel I have a background at the FTC. I have worked as director of the Bureau of Consumer Protection and of the Bureau of Competition.

Let me summarize in a little more detail than Bob did the postive agenda that we outlined. In antitrust, we recognize that mergers are the most crucial aspect of the Commission's antitrust mission, but what we had to say that was most important was about the Commission's nonmerger agenda.

We suggested that outside the criminal price-fixing area, there were a series of cases where the FTC could have a very useful mission to play. These cases often involve complex legal issues such as a possible exemption from the antitrust laws and may require sophisticated economic analysis and understanding of the industry.

The leading example in which the Commission has in fact played the useful role we discuss and has achieved bipartisan support is in health care. The Commission, starting in the 1970s and continuing in the 1980s has through a series of cases, advisory opinions, guides, and in a few cases, rules, had a beneficial impact in promoting competition in health care. It has not been without controversy. In the late 1970s and early 1980s some of the professions, particularly the American Medical Association, tried to get themselves exempted from the Federal Trade Commission Act, nevertheless, our committee was unanimous in concluding that the Commission's role in health care had been very positive.

In consumer protection, one of the most striking developments that we found and supported was what has happened in fraud. In 1969, the first Kirkpatrick report had suggested the Commission become more active in fraud but quite frankly, as we point out, the Commission did not have some of the tools that it needed. Congress gave the Commission better tools in the 1970s and the Commission has started to use those tools effectively, resulting in a fundamental shift in the way the Commission does business. The Commission now goes, particularly in fraud cases, directly into Federal court. Because of the powers that Congress gave it and court interpretation of those powers the Commission is able to move quickly to tie up assets and to get money back in the hands of consumers. We suggested that, improvements can be made, in the fraud area, particularly in better dealings with the states. The Commission has in fact started to do that, and we think that more can be done.

Finally, let me discuss the Commission's program as an advocate for consumers, appearing before state, local, and Federal agencies to advocate competition and the welfare of consumers. Although this has become somewhat controversial in the 1980s, this advocacy is something the Commission has done through its history. One of the reasons the Commission was created was to be an expert body to comment on various economic issues, and there is no doubt that regulations can have a major impact, both pro and con, on consumers.

We enthusiastically support the advocacy program. We note that, particularly before non-Federal bodies, the evidence shows that the Commission is presenting a viewpoint that is often not otherwise presented and that the people who receive the Commission's viewpoint find it useful, and often important, in making their decisions.

Thus, we conclude that the program ought to continue and be supported. It should not be restrained.

Thank you.

Senator BRYAN. Thank you very much, Mr. Muris. Mr. Calkins.

STATEMENT OF STEPHEN CALKINS, PROFESSOR OF LAW, WAYNE STATE UNIVERSITY LAW SCHOOL

Mr. CALKINS. Let me close with three points, slightly more general than those concerning the Commission's agenda that have already been addressed.

First, as already advertised we did indeed address the question of resources. We observed that the Commission is half the size it was a decade ago. There are a grand total of 118 lawyers in the Bureau of Consumer Protection, which I might note parenthetically is substantially smaller than numerous Washington law firms. We expressed regret that the Commission continues to appear not to use its resources as well as it could, but it seemed clear to us that the resources should be increased.

Second, our very first chapter concerned the question of Commission leadership. We squarely said what is perhaps obvious: that it is essential that commissioners be persons of stature. Only if they are persons of stature can the agency attract and inspire talented staff. Only if the commissioners are persons of stature can the agency enjoy the respect and confidence of the businesses that it regulates and the consumers that it protects.

I note in passing the concern of one merger lawyer with whom I spoke (and this is not in the report). He said, "Steve, you have got to have people of stature down there, for goodness sakes. When I take my client down concerning a multibillion dollar merger, I want that client to think we are going somewhere more distinguished than the Brooklyn traffic court." Stature is essential.

Finally, we have a fairly lengthy discussion of the very critical relationship between the Commission and Congress. Congress has a very important role to play in helping the Commission to do its job. Through oversight, through asking hard questions, through asking for studies and through giving needed guidance and legislative direction, Congress has an important role.

At the same time, we expressed concern that excessive micromanaging of the agency can defeat the purpose of the agency and harm both the agency and the Congressional review process. We offered a number of suggestions for improving relations between the FTC and Congress.

With that, let me just note that I assume you all have copies of the report and that one can be placed in the record. We are all available—I, as the counsel to the Committee, and Bob and Tim as two representatives of the diverse views on that Committee—to answer your questions.

Senator BRYAN. Thank you, Mr. Calkins. Let me begin by asking the question you yourself raised—the issue of stature. Are you suggesting that the Congress ought to consider in the reauthorization a more specific definition of qualifications or criteria for the President to be guided by in making selections to the FTC, and if so, what specific recommendations would you offer to us?

Mr. CALKINS. We did not make any such recommendation. We did consider what credentials potential Commissioners ought to have and we recommended that when the President considers appointments the President should search out persons of expertise and experience in the relevant subject matters—antitrust, consumer protection, government, economics—and that the President ought to search for people who have the intellectual capacity and the experience to do an effective job of administering the Commission's program.

With respect to whether that calls for legislation—and we did not address this—I can say that I personally think it would be awfully tough to draft a bill that specifies qualifications, I am afraid that it is probably a matter for the discretion of the President and the review process of the Congress.

Senator BRYAN. I do not think anyone would quarrel with the need to have and to appoint people of stature. If there is some particular area of expertise that you feel would be a condition precedent to the application of those criteria, the Committee would be interested in hearing it.

But I gather you are talking just generally as opposed to any specific change that you would ask us to consider, in terms of redefining what the parameters of the selection process ought to be for any President?

Mr. CALKINS. I think that is correct. I would just add a personal comment which is not specifically in the report. It would be interesting to compile a list of the 200 or 250 leading authorities in antitrust and consumer protection and economics and then do a computer search of the names of nominees over a period of time. I personally would hope that at at least two of the five Commissioners would be persons whose names would turn up in such a computer search.

But that is a personal observation. We just emphasized the criticalness of the qualifications and the qualities of the people who lead this agency. If you do not have good people, it is all hopeless.

Senator BRYAN. Let me shift the focus of the inquiry. I happen to share the view that the Commission's activities have indeed been handicapped by the funding level, that you commented upon. Accepting the reality of our time that there are going to be funding constraints because of the budget deficit, it seems to me that we ought to take a look and see how the Commission can function more effectively. With regard to the relationship with the attorneys general of the respective states, the Center for Science in Public Interest went so far as to suggest that there ought to be a memorandum of understanding between them. My question to you is, is there a way in which, as you see it, the overall activity, or the objective of the Commission, the objective can be enhanced by a closer working relationship with the attorneys general?

If you agree that that is a fruitful area, can you outline some criteria or parameters for that framework? And I would throw that open to any one of the panel.

Mr. CALKINS. Tim, do you want to talk about that?

Mr. MURIS. It is very important for the Commission and the states to try to work more closely together. One reason is that even between them resources are limited. But there is another problem as well. Different standards should not be applied to national problems. We expressed concern, particularly in the area of price advertising, that what the states are doing is problematic and is a different approach than the FTC has applied in the last 20 years.

What can be done? In areas in which the states and the FTC agree—and fraud is the best example—there should be closer cooperation. There ought to be a way for both to work directly on the same investigations. That has happened in a few cases, and I would hope it would happen a lot more.

On areas that are more sensitive, let me expand on a few points that we make. Representatives of the National Association of Attorneys General and the FTC ought to meet on a regular basis to discuss their projects and give each other a chance to comment in private, without having staked out public positions, on whether they agree. Sharing information in private before final decisions are are made, should improve enforcement. Because it is a fact of life that the states have gotten more involved in national problems, it is incumbent upon the FTC and the states to try to work more closely together.

There is a lot more common ground between the two than some of the disputes would indicate. Those disputes represent just a small part of the mutual activities.

Senator BRYAN. Do you think the MOU is a possibility?

Mr. MURIS. Yes, sir. I agree. There should be some sort of arrangement by which there is regular consultation and discussion on national advertising issues, on merger issues, on fraud, and on other issues.

Mr. PITOFSKY. May I add a word?

Senator BRYAN. Yes, please.

Mr. PITOFSKY. I think first of all, there is a question of attitude. As Tim has said, coordination would be useful. Treating state AG Offices as "counterrevolutionaries" I think is not useful. On specifics, it seems to me that in antitrust there are many areas which really involve local restraints and there is no reason why the FTC and the states cannot work together in areas like that.

In consumer protection, I have always been intrigued by the possibility that these FTC rules which have a local impact—for example, the Funeral Rule—could be better, enforced by the local state AGs.

I think that sending lawyers from Washington to a local community to enforce some specific provision of the Funeral Rule or the Health Care Rule may not be the best way to proceed. The state AGs are there. They know the community. They know the worst abuses and they could enforce those rules effectively.

Senator BRYAN. Thank you very much, Mr. Pitofsky.

Senator Gorton?

Senator GORTON. I would like to follow up on that last answer. My own guess is that it would require Federal legislation, or specific state legislation, to authorize the state attorneys general to carry out such enforcement activities. Do you agree, and can you give any other examples of where you think that kind of delegation of responsibility would be fruitful?

Mr. PITOFSKY. I agree that there would have to be some resorting of responsibilities. Most states have little FTC acts and therefore already have the authority. They might have to adopt something like the Trade Regulation Rules of the Commission in order to give people notice as to what those Rules call for.

I think much of the agenda of consumer protection could be divided into national and local restraints, national advertising should be regulated at the federal level. With all respect to the state AGs, I think it is a bad idea for the states to get into it. It is not sensible for 50 different states to be reviewing ad campaigns, with perhaps different views of what constitutes an implied claim.

But much other consumer protection work is really local, it has to do with consumer frauds in the funeral industry, the used car industry, health health clubs and that sort of thing and I believe if the Commission and the state AGs would get together and talk this through, they would be able to find a way to divide up that agenda.

Senator GORTON. One comment I have on which either you or Mr. Muris can make a comment, is that it seems to me both the implication of your last statement and those of Mr. Muris is that the National Association of Attorneys General and the Federal Trade Commission are similar organizations.

The FTC, while it has five members, has one policy generally speaking, even if it has to vote on it three to two. The National Association of Attorneys General organization here in Washington, D.C., cannot make policy decisions for 50 different, mostly elected officials. I see some difficulty in having a consultation which is between a staff here, with no authority over the positions which the Chairman and I held at one point or another, and what is a constantly shifting group.

It is easy to say that NAAG ought to get together with the FTC. I think it is going to be a little more difficult in practice. If the New York Attorney General, for example, does not like what staff here has done, that is the end of it. NAAG has no control over him at all.

Mr. MURIS. I understand the problems with the organization of NAAG, but if the states are going to get involved in these national problems, it is incumbent upon them and the FTC as well to try to work together.

Perhaps a few states will not like this cooperation. I have the same problems with the state's role as does Dean Pitofsky, but as long as the states are going to be involved in these national activities, they need to work with the Federal Government.

Senator GORTON. I think they do. I just believe that you ought to be cautious in thinking that an agreement can be made with one individual here and automatically have it apply to all of the states.

Let me ask a question which led to both an enlightening and entertaining discussion with the first panel, which I believe you heard. What difference does it make whether or not we reauthorize the FTC at all?

Mr. PITOFSKY. We did not address the question in our report. But reauthorization is an opportunity for Congress to review and comment upon what the Commission is doing and not doing, and I think it is important.

Mr. CALKINS. Well, I would just—again, speaking personally—say that I think the process is very important: to ask the Commissioners questions is important. For instance, to ask about oil price rises and perhaps even to ask for an economic study as to why prices have gone up. The whole process is very important and very useful.

If you give me a choice between a bad authorization bill and no authorization, I will pick no authorization any day, because the elevators do indeed run, and I have not heard a lot of people down at the agency expressing great regret or concern about not being authorized.

I think it is the process that is important. But I guess most important is that the eventual authorization be a good one.

Senator GORTON. You all have had considerable inside experience there as well as in studying the entity. Again, let me ask you the same question that I asked of the other panel. Without so much an emphasis on money as just on the way in which the agency runs, what is the particular value of a collegial or a noncollegial five member Commission as against a smaller number, or an agency with a single head, in connection with the Federal Trade Commission?

Mr. MURIS. In terms of these organizational issues, some of what we said is indirectly related to what you are asking. Many on our committee might organize the Federal Trade Commission differently in lots of ways if we were starting over. But we did not find any basic problems stemming from the current organization and the way that the Commission works. Rather than addressing organizational issues, we thought what was more important—and the real benefit of this report is that a cross-section of people, liberals, conservatives, Republicans, Democrats, consumer advocates—was articulating a common agenda for the FTC. The FTC needs to focus on this law enforcement mission, including consumer advocacy. Although in some abstract sense you might improve the organization, the emphasis in the next decade should be more on substance and less on tinkering with the organization.

Mr. CALKINS. In our discussion of the questions of the unity of functions and dual enforcement, we considered the benefits, if any, from having a multiheaded body. One of the benefits that sometimes gets forgotten occurs in merger enforcement. More than half of the agency's antitrust expenditures go to merger enforcement and I think most people would say it is the agency's most important antitrust mission and perhaps its most important mission—certainly it is critical.

With the Hart-Scott-Rodino process and the way that the mergers are cleared in advance—and sometimes restructured and settled in advance—frequently the most important decision of the whole ball game is whether or not there will be a complaint. Decisions tend to get made by prosecutors today and not by courts, because most mergers are resolved at the prosecutorial decisionmaking level.

Well, for a major multinational merger that is affecting the lives of millions of people, there is a substantial argument for saying that that decision ought to be entrusted to a group of people of diverse political views and of a variety of expertises who work together, consult with each other and make a reasoned, principled decision. That is how the decision ought to be made.

You can make a fairly good argument for saying that the Commission as a collegial body plays an important role in merger enforcement, in reasoning together to decide which mergers to challenge and which not, which is probably the most important merger enforcement decision.

Senator GORTON. That is a very good answer, Mr. Calkins. I appreciate it.

Thank you, Mr. Chairman.

Senator BRYAN. Thank you, Senator Gorton. Senator Kasten?

Senator KASTEN. Mr. Chairman, thank you. I just wanted Tim to ask you one question and I have not read this bar association report and I do not know if you addressed this question. Your role at the FTC and other places in government made you an expert in assessing the costs versus the benefits of different kinds of regulations upon reviewing testimony of people that are coming before us this morning and also testimony from at least one of the Commissioners, they are talking about this.

First of all, did the bar association look at this subject? How much money are we spending in order to get what kind of a result in terms of cost-benefit, and if you did, did you find that we have gotten the right kind of balance now?

There are some questions, about the fact that the FTC is spending a lot of money on a small business, or a very narrow kind of a restriction. Some think that they ought to be going after the larger ones.

Now, obviously Campbell's Soup is a larger one, but that was not part of the discussion. Can you talk to me about cost benefits? Did the ABA look at this question?

Mr. MURIS. We did not directly, as Dean Pitofsky said. It was not meant to be a report card. We do have some relevant comments. We certainly talk in a very supportive way about the need for the commission to use its economists effectively. One of the strengths of the Federal Trade Commission is its ability to bring economic analysis to bear in the way that you mention. We also discuss the importance of attacking fraud. Some people that the FTC may go after in some of these cases may be small, but such cases needs to be seen as part of a bigger picture. The Commission has used the powers that Congress gave it in the 1970s to more cost-effectively pursue fraud cases. But we did not directly try to assess whether there are certain areas in which it may not be cost beneficial for the FTC to pursue.

Finally, the FTC has become more efficient in merger enforcement as well. The Hart-Scott-Rodino process is a more efficient process to pursue the mergers than existed before.

Senator KASTEN. I do not know if either of you have additional comments.

Mr. **Pitofsky**. I would just add very briefly that, putting aside specific programs or cases, I think the message of the A&A report is that the FTC is a bargain at the price. It has a very important role to play.

There are no major legislative reforms that are necessary here; the FTC has used its new legislative authority, as Tim says, rather well and rather imaginatively. We are saying that the FTC is an important element of government regulation at this time.

Senator **Kasten**. Are there further comments?

If so, I have no further questions, Mr. Chairman. Thank you.

Senator **Bryan**. Thank you very much, Senator Kasten, and thanks to each member of the panel.

There may be some additional written questions that members of the subcommittee would have, and we would appreciate your responding to them as well.

Our next panel will consist of Mr. Daniel Jaffe, Executive Vice President for Government Relations, the Association of National Advertisers, Mr. Wallace S. Snyder, Senior Vice President, the American Advertising Federation, and Mr. Bruce Silverglade, Director of Legal Affairs, Center for Science in the Public Interest.

Gentlemen, welcome to the subcommittee. We will begin with Mr. Jaffe.

STATEMENT OF DANIEL L. JAFFE, EXECUTIVE VICE PRESIDENT FOR GOVERNMENT RELATIONS, ASSOCIATION OF NATIONAL ADVERTISERS, INC.

Mr. **Jaffe**. Good morning, Mr. Chairman.

As you mentioned, I am Daniel L. Jaffe, Executive Vice President of the Association of National Advertisers, and on behalf of the ANA I would like to thank the subcommittee for this opportunity to testify on the important issue of the reauthorization of the Federal Trade Commission.

For the last several years the Congress has been attempting to reauthorize the FTC. To some, therefore, these hearings may appear in Yogi Berra's classic phrase to be deja vu again. But ANA believes that if the FTC can be provided appropriate defined authority, the wait will have been worthwhile.

It is time to end once and for all the hand-to-mouth existence of the FTC. It is critical that a reauthorization bill be passed this year.

The FTC is a key regulatory body, and the Congress should provide it adequate support. In passing a reauthorization measure, ANA believes the following principles should be considered. First, national regulation of interstate commerce, including national advertising is imperative. There simply is no viable alternative.

Unfortunately we see a dangerous and accelerating erosion of this principle. Numerous states are attempting to regulate national advertising. This divergent regulation inevitably has and will lead to serious inconsistency and confusion.

The states have important regulatory responsibility within their borders and should not be diverted from this critical task by attempting to become national regulators.

I endorse the statement of Dean Pitofsky in the last panel where he accurately stated that the task of harmonizing 50 states, however sincere, the will to do so is pretty much of an impossible task.

Second, we believe the FTC must have adequate and clearly defined authority to forcefully regulate the marketplace. The FTC, however, must not be provided vague, amorphous, and unconstitutionally broad authority. Therefore, ANA applauds this committee's consistent efforts since 1980 to place a moratorium on the use of unfairness for across-the-board rule making. We believe this moratorium should now be made permanent. Unfairness is no standard. Like beauty, it varies with the eye of the beholder.

Third, once the FTC's authority is adequately and precisely defined, we believe continuing contraction of the FTC's resources and manpower must be halted. ANA has always supported cutting the fat out of the federal budget.

We are concerned, however, that eight years of continuous budget contraction at the FTC, if left unabated, will lead inexorably to not only cutting fat, but also sinew and bone.

If the FTC is allowed to atrophy, the states have already shown a willingness, in fact an eagerness, to try to fill what they claim is a growing regulatory vacuum, and ANA strongly believes the states cannot fulfill effectively this role or mission.

Unfortunately, there have been proposals at the federal level both in this and the last Congress that would drastically accelerate this dangerous trend. ANA believes the Congress should act with great caution before attempting to federalize the powers of the states.

Once the FTC's responsibility and capacity to regulate interstate commerce is eroded, regulatory Balkanization is certain to follow.

It is indeed ironic that while the European community is quickly moving towards establishng a single internal market by the end of 1992, the United States appears to be heading in the opposite direction. This movement can only weaken our ability to market goods efficiently in this country, and is totally counterproductive for our nation's economic health.

ANA commends the Senate for steadfastly maintaining its position that there should be a permanent ban on the FTC's ability to issue Trade Regulation Rules based on unfairness.

The Federal Trade Commission has broad and adequate powers to prohibit false or deceptive advertising on an individual and industry-wide basis.

We would hope that you would continue to maintain forcefully your position in regard to unfairness during the 101st Congress.

I would be happy to answer any questions you might have. Thank you very much.

[The statement follows:]

Statement of the
Association of National Advertisers, Inc.
by
Daniel L. Jaffe
Executive Vice President

Mr. Chairman and Members of the Subcommittee:

The Association of National Advertisers (A.N.A.) greatly appreciates this opportunity to testify. The reauthorization of the Federal Trade Commission (F.T.C.) is a matter of great concern to our membership. Today we will be using as a foundation for our comments the legislation approved by the Senate in the last Congress, S. 677, the Federal Trade Commission Act Amendments of 1987. We also intend to raise issues A.N.A. has not addressed in previous testimony but that are now ripe for discussion.

A.N.A., as many of you already know, represents the vast majority of national and regional advertisers in the United States. Our membership includes companies with over 2,000 subsidiaries, divisions and operating units located throughout the country. Our members provide nearly 80% of all national and regional advertising in this Nation.

As you are very much aware, since 1982 the House and Senate have been unable to reconcile their differences concerning the authority of the F.T.C. As a result the F.T.C. has been without formal authorization for nearly seven years, operating only through F.T.C. appropriations measures or through continuing funding resolutions. A.N.A. believes this hand-to-mouth existence is not in the best interest of industry and consumers alike.

In passing a reauthorization measure, A.N.A. believes the following principles should be considered.

First: National regulation of interstate commerce, including national advertising, is imperative. There simply is no viable alternative.

The states cannot replace the F.T.C.'s regulatory authority. Unfortunately, today we see a dangerous and accelerating erosion of this principle. Numerous states, following divergent policies, are attempting to regulate national advertising. This divergent regulation inevitably has led to inconsistency and confusion. Even when the states have attempted to harmonize their enforcement policies through so-called "guidelines," these dangers have not been avoided. Careful examination of the "guidelines" demonstrates that they are not, as they purport to be, merely a restatement of existing state law. They, in fact, are an attempt by the states to arrogate major new regulatory authority in the advertising area. Furthermore, the guidelines call for restrictions that are overbroad, unnecessary for the protection of consumers, and in many instances unconstitutional. Finally, as a recent court case has determined * these new regulatory requirements, at least in regard to airline advertising, are preempted by federal law. The states have a crucial regulatory role to play within their borders, but should not be diverted from this critically important responsibility in an attempt to become national regulators.

Second: We believe the F.T.C. must have adequate and clearly defined authority to regulate forcefully the marketplace. Business and consumers alike have a common and equal interest in an honest marketplace. The F.T.C., however, must not be provided vague, amorphous, and unconstitutionally broad authority. Therefore, A.N.A. applauds the efforts of the Senate, and in particular the consistent efforts of this Committee, since 1980 to place a moratorium on the use of unfairness for across the board rulemaking. We believe that this moratorium should now be made permanent. Unfairness authority is totally unnecessary to protect consumers, the marketplace, or the national welfare.

Third: Once the F.T.C.'s authority is defined adequately, we believe continued contraction of the F.T.C.'s resources and manpower must be halted.

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*Trans World Airlines, Inc. v. Mattox, No. A-89-CA-067, D.C. W. Texas (4/26/89).

A.N.A. always has supported cutting the fat out of the federal budget. We are concerned, however, that eight years of continuous budget contraction, if left unabated, will inexorably lead to not only cutting fat but also sinew and bone.

Advertising is Speech Broadly Protected by the First Amendment

Before discussing the unfairness issue in more detail, we believe it is important to emphasize that commercial speech has broad constitutional protection. The United States Supreme Court has made clear that commercial speech plays a crucial role in our economy. Justice Blackmun, speaking for the United States Supreme Court, noted that: "(T)he free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system (and also) to the formation of intelligent opinion as to how that system ought to be regulated or altered." Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, at 765 (1976).

In fact the U. S. Supreme Court has made clear that, under constitutional principles, commercial speech -- advertising — cannot be restricted or proscribed unless the court* determines (1) that it is deceptive, or (2) that the restriction directly serves a substantial governmental interest and the restriction is no more extensive than is necessary to serve that interest. Central Hudson Gas Company v. Public Service Commission, 447 U.S. 557, at 563-564 (1980); In re R.M.J. 102 S.Ct. 929, at 937-38 (1982).

Simply, nondeceptive advertising must not be censored because of bureacratic ideologies as to what is "fair" or "unfair."

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*Blount v. Rizzi, 400 U.S. 410 (1971); Brookhart v. Janice, 344 U.S. 1 at Fn. 4, p. 4 (1966).

The Federal Trade Commission Should Not Have The Power To Proscribe or Restrict Truthful, Nondeceptive Commercial Speech as "Unfair"

In calling for a permanent moratorium on the F.T.C.'s use of the unfairness standard, let us be clear on what we are not seeking. We are not seeking to weaken the protection of consumers from injury due to false, deceptive or misleading advertisements. Nor are we seeking to reduce prompt and effective prosecution by the Federal Trade Commission in appropriate cases. Although the F.T.C. has on occasion been overzealous in enforcing its powers to enjoin "deceptive" advertising, A.N.A. strongly believes that claims or statements that constitute harmful misrepresentations cannot be countenanced in our industry under any circumstance.

Furthermore, we are not seeking to affect in any way the F.T.C.'s power to require that objective claims made in advertisements must have prior substantiation, and be based upon factual support in the possession of the advertiser such as would satisfy a reasonable advertiser as to their truth. Lack of such substantiation in our view would be deceptive.

Finally, we are not seeking to destroy or weaken the F.T.C. in any way; to the contrary, we think it needs to be strengthened. But our industry is acutely aware that the F.T.C. has in the past overstepped the boundaries of its Congressional mandate through the use of unfairness, and that danger needs to be remedied once and for all.

As you are aware, the Senate in the last Congress overwhelmingly agreed with this position by passing a three year F.T.C. authorization bill (S. 677), which included an unfairness exclusion, by a vote of 88-9.

The Senate Commerce Committee expressed succinctly A.N.A.'s opinion in regard to unfairness in its report on S. 677.

The Committee report stated:

> Because the unfairness standard for the regulation of commercial advertising practices goes beyond the elimination of misleading or deceptive commercial speech, it presents a constitutional conflict with first amendment protections for free speech. Section 11 of S. 667, which makes permanent this moratorium on new section 18 rulemaking to regulate advertising based on unfairness, is motivated by the Committee's continued concern with the potential for abuse in this area.

A.N.A. believes the Federal Trade Commission has sufficient power to protect consumers and business without having to resort to the unfairness standard as a basis for advertising trade regulation rulemaking. The Commission has broad powers to prohibit false or deceptive advertising on an individual and industry-wide basis. Historically, deception has been the foundation for the F.T.C.'s regulation of advertising. For industry-wide rulemaking, however, the F.T.C.'s unfairness authority is so broad and vague that it cannot appropriately be applied to commercial advertising.

Let me provide just a few examples of where the Commission attempted to use the unfairness standard before the Congress found it necessary to step in and place a moratorium on the use of unfairness for advertising Trade Regulation Rulemaking in 1980.

When the F.T.C. attempted to ban advertising directed to children, the ban was based on the unfairness standard. The F.T.C.'s proposed children's rule even would have prevented the truthful, nondeceptive advertising of baseball gloves and bats. Congress wisely stepped in and barred this rulemaking.

Likewise, the over-the-counter drug rule, which was predicated on "unfairness," would have required advertisers to use the identical language in an advertisement that was required on the product label. Thus, a cough syrup would not have been allowed to be advertised as cough syrup but only as an "antitussant." A stomach remedy would have had to be advertised as an "antiflatulent." Rather than helping the consumer, this rule would have created mass confusion.

Finally, if the antacid Trade Regulation Rulemaking originally proposed by the F.T.C. staff under its unfairness power had been promulgated, every antacid advertisement would have been required to contain warnings about sodium content. The F.T.C.'s Bureau of Economics determined it would be cheaper to call the patients at risk personally than to require the disclosure of sodium content of antacids in an advertisement.

The Committee should consider the serious economic costs which the Commission's pursuit of the unfairness doctrine imposes upon advertisers, and thus upon the consuming public. It is wrong to assume that no harm is done if the F.T.C. goes off on one of its unfairness escapades but subsequently is forced to or decides to end the effort. Someone has to pay for that exercise, and in the final analysis it is the taxpayer and the consumer who pays.

If advertising is to continue to play its vital role in our economy, it must be protected from unjustified restraints. Truth and accuracy are concepts advertisers can, should and do live with. On the other hand, advertising cannot live with an amorphous and ever-changing concept of "unfairness." This characterization is no standard; like beauty, it varies with the eye of the beholder.

In light of these remarks, what might appear to be called for would be for Congress to fulfill its legislative responsibility by putting definitional perimeters around the word "unfair." However, A.N.A. believes that no definition can be articulated which competently provides adequate objective criteria for the use of "unfairness" by the Commission. We believe such an effort ignores the intractable and elusive nature of the concept of unfairness.

In a nation that prides itself upon a representative form of government, it is intolerable that three, or even on occasion only two, Federal Trade Commissioners * have the power to censor whatever commercial advertising they personally deem offensive, which they then will label as "unfair." So broad a power to legislate should properly belong only to the Congress and to the President; both chosen by the electorate as Federal Trade Commissioners are not.

The Need for Adequate Resources For The F.T.C.

The recently published report of the American Bar Association on the role of the F.T.C. (the "Kirkpatrick Commission" study) documented in real terms the economic and personnel pressures the F.T.C. has faced for the past nine years.

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*Three out of five Commissioners constitute a quorum and two of those three can act for the Commission.

The Kirkpatrick Commission noted that:

> For fiscal year 1979, which ended September 30, 1979, the Commission employed 1,746 workers . . . since 1979, Congress has provided funds for significantly fewer people: 1,719 in 1980, 1,491 in 1982, 1,238 in 1984, 1,017 in 1986, 986 in 1988, and 923 (projected) for 1989. The Commission needs a stable environment in which to pursue its mission, and the budget problems of recent years, with the resulting reductions in force, have not provided that environment.

The Kirkpatrick Commission concluded that the decline in the F.T.C.'s real resources should be halted. A.N.A. supports this finding.

Let us provide just one example, that could be multiplied substantially, to demonstrate the need to halt the slide in F.T.C. funding. The problem of telemarketing fraud has drastically increased in the United States. Highly conservative estimates conclude that businesses and consumers are losing more than $1 billion each year from telemarketing scams alone. Providing the F.T.C. the resources to combat these types of problems, in A.N.A.'s view, would be highly cost effective.

The F. T. C. and the States

If the F.T.C. is allowed to atrophy, the states already have shown a willingness, in fact an eagerness, to try to fill what they claim is a growing regulatory vacuum. As we stated earlier, A.N.A. strongly believes that the states cannot fulfill effectively this role or mission.

Unfortunately, there have been proposals at the federal level, both in this and the last Congress, that would drastically accelerate these dangerous trends. Legislation, for example, was introduced in the last Congress to allow the state attorneys general to be allowed to sue in any federal district court under unfair or deceptive acts or practices powers, the same powers the F.T.C. has. This in effect would create fifty state attorneys general serving as federal prosecutors under the F.T.C. Act. In this circumstance, the hundreds of federal district courts in this country would then become the oracles of the Federal Trade Commission Act. This circumstance would make it virtually impossible to have a centralized source of expertise and crystallized coherent national regulatory policy. In effect, the primacy of the F.T.C. would be diminished and the states would be elevated to a central and possibly predominant role in regard to the regulation of interstate commerce and national advertising. This inevitably will lead to regulatory chaos.

In this same vein, there are proposals presently in the Congress to allow the state attorneys general the right to sue in any federal district court under very broad definitions of "telemarketing fraud." We believe the Congress should act with great caution before attempting to federalize the powers of the states. We believe the F.T.C. should have primary regulatory responsibility in these areas. Once the F.T.C.'s responsibility and capacity to regulate interstate commerce is eroded, regulatory Balkanization is certain to follow.

It is indeed ironic that while the European Community is quickly moving toward establishing a single internal market by the end of 1992, the United States appears to be heading in the opposite direction. This movement can only weaken our ability efficiently to market goods in this country and is totally counterproductive to our Nation's economic health.

The Rulemaking Record

One other major point should be considered. The rulemaking safeguards of the Magnuson-Moss Act were imposed to ensure that the affected industries have a full and fair opportunity to defend themselves. As the drafters of these rules stated:

> Because of the potentially pervasive and deep effects of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words 'unfair or deceptive acts or practices,' the Committee believes greater procedural safeguards [than mere notice and comment] are necessary. H.Rep. No. 93-1107, 93rd Congr., 2d Sess., May 17, 1973, p. 45.

However, under Sec. 18(e)(1)(B) of the Federal Trade Commission Act, in the "Unfair or Deceptive Acts or Practices Rulemaking Proceedings" provision, the term "rulemaking record" means "the rule, its statement of basis and purpose, the transcript required by subsection (c) (5), any written submissions, and any other information which the Commission considers relevant to such rule." (emphasis added). This is totally open-ended. Moreover, under Sec. 18 (e) (3), for purposes of judicial review of such a rule "(t)he term evidence...means any matter in the rulemaking record." A.N.A. believes these provisions are an invitation for the F.T.C. to put as much information it can into the rulemaking record so it can shield itself against reversal by a reviewing court. This hardly comports with the First Amendment's protection of commercial speech. A.N.A. believes that conformance with constitutional principles could be achieved by deleting the phrase "and any other information which the Commission considers relevant to such rule" from the existing statute.

Conclusion

It is the duty of Congress to maintain a national regulatory scheme over interstate commerce. Congress has vested much of its interstate commerce responsibilities in the Federal Trade Commission. If the F.T.C. is to follow the mandate of Congress, it must be given the necessary funds and the appropriate powers to carry out its mission. Failure to pass a reauthorization bill for the F.T.C. would create the impression that the Congress does not place a high priority on the functioning of the Commission. This would be highly unfortunate. A.N.A. believes the F.T.C. is clearly one of the most important regulatory bodies in the government and should be treated accordingly.

There is a new Administration. Also, Congress in the next several months will play a major role in determining the makeup of a majority of the F.T.C. Commissioners. The time, therefore, is ripe for the Congress to reauthorize the F.T.C. If Congress is unwilling or unable to authorize additional funding for the F.T.C. due to budget constraints then, at the very least, it should seriously consider earmarking specific funds for projects it deems of utmost priority.

A.N.A. commends the Senate for maintaining steadfastly its position that there should be a permanent ban on the F.T.C.'s ability to issue trade regulation rules based on unfairness. We hope that you will continue to retain forcefully this position during the 101st Congress.

We appreciate your consideration of our views.

Senator **Bryan**. Thank you very much, Mr. Jaffe.

Mr. Snyder, we will hear from you next.

STATEMENT OF WALLACE S. SNYDER, SENIOR VICE PRESIDENT, AMERICAN ADVERTISING FEDERATION

Mr. **Snyder**. Thank you, Mr. Chairman. My name is Wally Snyder, Senior Vice President of American Advertising Federation. AAF represents major advertisers, the agencies, the networks as well as 42,000 individual advertising professionals across the country.

My testimony is also presented on behalf of the American Association of Advertising Agencies. The AAAA's membership includes 760 ad agencies who created and placed more than 85 percent of the national advertising in this country and we are joined here today by Hal Shoop, Executive VP of the AAAA.

For us the Federal Trade Commission is a major government agency regulating advertising. In addition, its cases and opinions over the years have greatly influenced advertising self-regulation and state and local government agencies. Therefore, the reauthorization of the commission is of great interest to our members.

In recent years there have been criticisms by consumer groups and state regulators about the FTC's enforcement of its important mandate to regulate advertising. And state attorneys general and their association, the National Association of Attorneys General, have greatly increased their scrutiny of national ad claims.

This has resulted in federal and state ad standards that often are inconsistent and, in our view, often result in overregulation by some of the states of useful and truthful advertising.

Where the FTC has taken action, as against Campbell's Soup, the states have also stepped in with expanded legal theories during the pendency of the FTC case.

The criticism of the FTC is due both to a perception of inactivity and to a disagreement with its critics as regards the deception standards to be applied to advertising, especially as regards the basis for affirmative disclosure groups.

Sometimes state regulators require more information than can be contained in a 30-second ad, and they treat the ad almost as a final contract. The FTC appropriately requires only material disclosures needed to qualify the ad claims and recognizes that the label also is available for very important information. I say some and not all cases, and we do not criticize all state attorneys generals' actions.

We believe that the perception of FTC activities is unfounded. The FTC contends it is bringing about the same number of cases as in the past. The commission currently has ongoing several national advertising cases, but we do not believe that numbers are the best way to judge here. It must be recognized that the ad industry's successful self-regulation program over the years has obviated much of the need for FTC intervention.

The AAF agrees with the recent conclusion in ABA's special report on FTC that the FTC must play the predominant role in national ad regulation. We urge the new FTC administration to articulate that the agency will play the leading and a visible role in regulating national advertising.

Speeches and public discussion of its cases would be very useful. Also, the new chairperson must set a collegial tone with state attorneys general and seek their input into setting FTC advertising standards.

For the last nine years the AAF has been deeply involved in the FTC's reauthorization proceedings, which are directed toward determining the responsibilities the agency will have. We believe the provisions contained in the 1980 reauthorization bill which have been extended in successive resolution have benefitted both the economy and the public. They provide the agency with extensive remedial powers to regulate false and misleading advertising on the basis of a broad deception standard both on an individual case and industry-wide basis.

In addition, the agency can bring individual ad cases under an unfairness standard. The fact of the matter is the FTC has relied upon its deception authority exclusively over the years to regulate advertising when the commission's unfairness authority has been used, it has always been coupled with a charge of deception. In fact, the unfairness jurisdiction has been almost superfluous in advertising regulation and has never formed the basis for a final FTC advertising rule.

And, today the commissioners testified that FTC authority without unfairness is workable and adequate. Yet consumer groups sometimes have argued that the unfairness standard in trade regulation rule making is necessary for the FTC to effectively regulate advertising. AAF's opposition to these unfairness to regulate ads rests on it being too vague and subjective. When the FTC has attempted to apply the unfairness standard in past ad regulation as in the proposed children's ad rule and the over-the-counter drug rules, the result has been costly and protracted proceedings, ultimately terminated.

Past experience demonstrates that the unfairness authority cannot be applied in a predictable and appropriate manner in advertising matters. Nor does it square with First Amendment commercial speech guarantees as articulated by the Supreme Court. AAF believes that the Federal Trade Commission's current legislative authority fully protects the American public. The deception standard provides the agency with broad power to regulate advertising.

AAF's goal is that the FTC be authorized with power to protect consumer and business interests by regulating deceptive advertising and that the current restriction of its use of unfairness authority in advertising rule making be made permanent.

Thank you very much, Mr. Chairman.

[The statement follows:]

U.S. Senate
before the
Subcomittee on the Consumer

STATEMENT OF THE AMERICAN ADVERTISING FEDERATION ON REAUTHORIZATION OF THE FEDERAL TRADE COMMISSION

June 7, 1989

Introduction

The American Advertising Federation (AAF) is a national trade association that includes within its membership all of the various elements of the advertising industry. The membership includes national corporations that manufacture and advertise consumer products, major advertising agencies, national newspaper and magazine publishers, radio and television broadcasters, all three networks, and 22 other national trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation also represents the "grassroots" of the advertising industry as the parent body of more than 225 local advertising clubs and federations located throughout the United States with a combined membership of approximately 42,000 advertising practitioners. These local organizations, like the AAF. represent a broad constituency, including professionals from advertisers, advertising agencies and media.

The American Advertising Federation, in response to an invitation dated May 22, 1989, from the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, hereby express its views on (1) the performance of the Federal Trade Commission and the effectiveness of its Consumer Protection law enforcement, and (2) our perspective on the Senate and House version of FTC reauthorization bills passed by the Senate and House in the 99th and 100th Congress. With respect to the reauthorization issue, we shall focus on the FTC's use of unfairness authority.

SUMMARY OF TESTIMONY

The Federal Trade Commission is the major government agency regulating advertising. In addition, its cases and opinions over the years have greatly influenced advertising self-regulation units and state and local government agencies.

In recent years there has been criticism from consumer groups and state regulators about the FTC's enforcement of its important mandate to regulate advertising. And, state attorneys general and their association - the National Association of Attorney General ("NAAG") - have increased greatly their scrutiny of national ad claims. This has resulted in federal and state ad standards that are patently inconsistent, and in the view of the AAF, over-regulation by the state of truthful and useful advertising.

The criticism of the FTC is due both to a perception of inactivity and to a disagreement with its critics as to deception standards to be applied to advertising, especially as regards the basis for affirmative disclosures. The AAF agrees with the recent conclusion in "The ABA Special Committee's Report on the FTC" that the FTC must play the predominate role in national ad regulation. We urge the new FTC administration to articulate that the agency will play a leading and significant role in regulating national advertising. Also, the new chairperson must set a collegial tone with state attorneys general and seek their input into setting FTC advertising standards.

For the last nine years, the AAF has been deeply involved in the FTC's reauthorization proceedings, which are directed towards determining the responsibilities that the agency will have. The last reauthorization bill expired in October of 1982. Since then, Congress has failed to pass a bill reauthorizing the Federal Trade Commission and numerous continuing resolutions have been necessary to keep the agency in operation.

AAF believes the provisions contained in the 1980 reauthorization bill, which have been extended in successive resolutions, have benefited both the economy and the public. They provide the agency with extensive remedial powers to regulate false and misleading advertising on the basis of a broad deception standard, both on an individual case and industry-wide basis. In addition the agency can bring individual ad cases under an unfairness standard.

All those familiar with the FTC know that it has relied upon its deception authority almost exclusively over the years to regulate advertising. When the Commission's unfairness authority has been used it usually has been coupled with a charge of deception. In fact, the unfairness jurisdiction has been almost superfluous in advertising regulation and has never formed the basis for a final FTC advertising rule. Accordingly, AAF asserts that the prohibition on FTC use of unfairness in industry-wide rules contained in the 1980 Reauthorization Act remains appropriate.

Some consumer groups have argued that the unfairness standard in trade regulation rulemaking is necessary for the Federal Trade Commission to effectively regulate advertising, despite the fact that unfairness has played no role in past effective ad regulation. These groups argue in favor of extensive regulatory powers which, as will be discussed below, have in the past been used to justify extreme over-regulation.

AAF's opposition to the use of unfairness to regulate advertising rests on it being too vague and subjective. When the FTC has attempted to apply the unfairness standard in past ad regulation -- as in the proposed Children's Advertising and the Over-The-Counter Drug rules -- the result has been costly and protracted proceedings ultimately terminated by the Commission. Past experience demonstrates that the unfairness authority cannot be applied in a predictable and appropriate manner in advertising matters.

AAF believes that the Federal Trade Commission's current legislative authority fully protects the American public. The deception standard provides the agency with broad power to regulate advertising. AAF's goal is that the FTC be authorized with power to protect consumer and business interests by regulating deceptive advertising and that the current restriction on its use of unfairness authority in advertising rulemaking be made permanent.

Therefore, on behalf of its members, the AAF strongly urges that Section 18(h) of the Federal Trade Commission Act (15 U.S.C. 57a(h)) be amended by adding at the end thereof the following:

> The Commission shall have no authority under this section to initiate any new rulemaking proceeding which is intended to or may result in the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

FTC PERFORMANCE OF ITS AD REGULATION MANDATE

The FTC leadership maintains that the agency's level of ad regulation activity is consistent with that of past administrations. However, critics of the agency, including consumer organizations, argue that the FTC is not bringing enough national ad cases. State attorneys general claim that they have increased their scrutiny of national ads because of a lack of FTC activity.

The AAF does not agree with the contention that the FTC must bring additional advertising cases to carry out its consumer protection mandate. The FTC contends that it is bringing about the same number of cases as in the past. At any rate, the agency's performance should not be evaluated on numbers alone. It should not be assumed that a relatively small number of cases indicates that the FTC is not doing its job in regulating national advertising. It must be recognized that the ad industry's successful self-regulation program over the years has obviated much of the need of FTC intervention.

The disagreement over FTC ad regulation performance turns largely on the contending parties' views of the deception standards that should be applied. This is especially true in the requirements for affirmative disclosures in advertising.

Specifically, certain state attorneys general, and the National Association of Attorneys General, often tend to argue that every limitation of an offer and every negative aspect of a product must be conveyed in the advertisement. In essence, they view the ad almost as a final contract that must contain all of the required legal clauses and conditions. This view makes it almost impossible to make price claims in broadcast advertising. For example, the NAAG guideline on car rental ads suggests a twenty-nine word affirmative disclosure, and the accompanying text acknowledges that this may make it impossible to make price claims in fifteen second ads. In fact, it may make it impossible to convey this information in thirty second ads, which together with fifteen second ads comprise 95% of tv advertisements. AAF contends that consumers will be the big losers if price advertising is chilled by over-regulation.

On the other hand the FTC requirements for affirmative disclosures appropriately draw the balance by requiring that only "material" disclosures are necessary to qualify actual claims found in the advertisements. AAF supports this standard because it provides the relevant information to consumers without chilling the important price or other product information needed by consumers to make selections.

The real question is, who is in charge of national ad regulation? Who sets the standards that advertisers and broadcasters must comply with when they market products nationally? National advertisers cannot comply with two sets of inconsistent standards, and they should not be over-regulated by the states to the detriment of the consumer.

The AAF agrees with the conclusions and suggestions in the ABA report on this important issue. First, the FTC must play the predominate role in regulating national advertising. But, we recognize - as does the report - that the states will stay involved in this area. The FTC should seek imput on national ad regulation from the states, and in turn should offer its expertise to the states in local matters.

LEGISLATIVE HISTORY OF FTC REAUTHORIZATION

During the 99th and 100th Congress, AAF supported Senate reauthorization bills (S. 1078 and S.677), which codified the existing ban on using the unfairness standard in agency rulemaking proceedings related to commercial advertising.

AAF opposed the House version of the reauthorization bill in the 99th Congress (H.R. 2385) and again in the 100th Congress because of its inclusion of the unfairness authority.

We urge the Senate in the 101st Congress to reauthorize the Federal Trade Commission without authority to bring industry-wide advertising rulemaking proceedings based on unfairness and to make this permanent by amending Section 18(h) of the FT Act (15 U.S.C. 57 (h)) should we urge codification of the ban?

APPROPRIATE FTC REGULATORY POWERS

AAF believes the FTC possesses broad and fully adequate powers to regulate advertising on the basis of the deception standard for individual cases and industry-wide rules. Further, we note that in the 100th Congress S. 677 permited the FTC to bring individual advertising cases using unfairness as the basis.

In practice, the Commission has found its deception authority adequate to successfully challenge a wide range of advertising practices:

Colgate-Palmolive Company (misleading depiction in TV ad of performance of shaving cream);

Campbell Soups Company (misleading depiction in TV ad of quality of soup);

Standard Oil of California (misleading demonstration of gasoline's anti-polution properties);

Sun Oil Company (misleading demonstration of gasoline's performance.

Warner-Lambert Company (false claims of a mouthwash's ability to prevent colds and sore throats and to provide symptomatic relief);

American Home Products, Bristol-Myers and Sterling Drug (unsubstantiated comparative pain relief claims for analgesics);

Sears Roebuck and Company (unsubstantiated cleaning perfomance claims for a dishwasher);

Litton Industries (unsubstantiated ad claims for a microwave oven based on survey results);

Champion Home Builders (unsubstantited performance claims for a solar furnace);

Brown & Williamson, Inc. (misleading claims as to the tar and nicotine content of a cigarette);

GRI, Inc. (unsubstantiated claim that a vegetable pill prevented certain cancers from occuring); and

Thompson Medical Company (unsubstantiated therapeutic claim that a topical cream produces pain relief).

Several ongoing national advertising cases, based on the agency's deception authority include R.J. Reynolds (alleged deceptive health claims), Kraft, Inc. (alleged un- substantiated health and nutrition claims) and Campbell Soups Company (alleged unsubstantiated health claims). Also, the current FTC cases in district court challenging so-called "infomercials" for baldness cures are based on deception. (California Pacific Research, Inc. and Pantron I, Corp).

In addition to this sample of litigated *national* advertising cases based on deception authority, there can be added to this list hundreds of consent settlements for a vast range of consumer products including foods, computers, toys, automobiles, home appliances and over-the-counter drugs. Importantly, the Commission has concluded that its deception authority embraces the failure of a company to possess and rely upon a "reasonable basis" for its ad claims, the theory frequently relied upon by the Commission to challenge advertising claims.

All of the sitting FTC Commissioners who have testified previously on this issue have made it clear that they would support a reauthorization bill which restricts the Commission from using unfairness in advertising trade regulation rulemaking. This was made clear in hearings on the FTC reauthorization before this subcommittee in the 100th Congress. The Commissioners expressed a strong desire to quickly reauthorize the agency by reaching an agreement on the unfairness authority:

> We [the Commission] also have no objection to the provision in S. 1078 that would remove the Commission's authority to promulgate industry-wide rules governing advertising under the "unfairness" standard. The Commission's experience in this area suggests that rulemaking may infrequently be a useful enforcement mechanism for "unfair" advertising.
>
> FTC Chairman Daniel Oliver

> In my view, the most important consideration here is that the Commission should be allowed to keep its authority to bring individual cases. Whether the Commission should have rulemaking authority is a closer question. While the Commission's unfairness authority is indisputably broad, Congress could properly limit that jurisdiction (as applied to commerical advertising rulemaking proceedings) short of eliminating it altogether.
>
> FTC Commissioner Andrew Strenio

> I generally oppose limitations on the Commission's substantive authority, including the proposed limitation on the Commission's ability to issue rules based on unfairness in advertising. I recognize, however, that the Commission is unlikely to have frequent occasions to exercise that authority and that if the proposed limitation is imposed, the Commission would retain its ability to deal with unfair advertising on a case by case basis. With that in mind, if the Congress should decide that this particular limitation should be imposed, I believe that it would not seriously impair the Commission's ability to carry out its mission to protect the American consumer.
>
> FTC Commissioner Mary Azcuenaga

SPECIFIC PROBLEMS WITH FTC UNFAIRNESS AUTHORITY

AAF maintains that the unfairness authority is so broad and vague that it cannot be applied appropriately to industry-wide advertising proceedings. The reauthorization bill that passed the House in the 100th Congress did not even attempt to define the authority, and the definition contained in the House bill in the 99th Congress lends itself to subjective interpretation which, as past events witness carries the danger of over-regulation. The uses that certain consumer groups would have the FTC make of its unfairness jurisdiction illustrate the threats that would be made to truthful advertising. And finally, the use of unfairness to prohibit non-deceptive advertising may well be unconstitutional.

The House in the 99th Congress defined "unfairness" in (H.R. 2385 as follows:

> An act or practice in or affecting commerce shall be considered to be an unfair act or practice under subparagraph (A) if--
>
> (i) such act or practice causes or is likely to cause substantial unjury to consumers; and
>
> (ii) such substantial injury (I) is not reasonably avoidable by consumers; and (II) is not outweighed by countervailing benefits to consumers or to competition which result from such act or practice.
>
> Any determination under the preceding sentence regarding whether an act or practice is an unfair act or practice shall take into account in addition to other relevant factors, whether such act or practice violates any public policy as established by Federal or State statutes, common law, practices in business or industry or otherwise.

The three part test contained in the first sentence of the definition represents an attempt to require that the Commission base an unfairness finding an actual consumer injury. That attempt is wholly overcome by the next sentence that permits an unfairnesss finding based on determination that the practice "violates any public policy..."

This would permit a future Commission majority to avoid the type of hard economic analysis seemingly envisioned by the first sentence, and instead censor truthful ads based on a vague standard that presumably could include "emotional" harm.

Commissioner Terry Calvani testified in opposition to this provision in hearings before the Senate Consumer Subcommittee in the 100th Congress:

> I am, however, opposed to the language in the House bill providing that any unfairness determination must take into account whether an act or practice "violates any public policy." The House language is at best vague and confusing and at worst would spawn decisions that pay little deference to the appropriate unfairness standard the House bill otherwise purports to embrace.
>
> FTC Commissioner Terry Calvani

Even without the second sentence the definition remains vague when applied to advertising regulation. The three part test is an "effects" test. Yet, there is no requirement that the Commission use objective evidence to link the content of a truthful ad to the substantial injury. The AAF is concerned that future Commissioners may simply censor ads because of subjective evaluations that they are objectionable for various reasons.

Furthermore, the Center For Science in the Public Interest (CPSI) during the last Congress indicated its agenda included pushing for extensive regulation of truthful advertising using FTC unfairness authority for trade regulation rules. For example, CSPI stated in a letter to the Hill that it was concerned that without unfairness authority, "the FTC will be barred from efficiently addressing, on an industry-wide basis, advertising by cigarette and tobacco product manufacturers, alcoholic beverage producers, purveyors of junk food and advertisers of products that can be dangerous if used by children."

AAF believes that these issues should only be addressed by the FTC through the deception standard. While we believe that it is fully appropriate for the FTC to regulate false, deceptive and misleading statements in advertising, the AAF does not believe the FTC should have the authority to censor whole categories of truthful non-deceptive commercial speech on an agency conceived notion of unfairness.

The AAF also believes that the unfairness authority, where used to censor truthful advertising, runs counter to the First Amendment protection accorded truthful commercial speech. The Supreme Court in Central Hudson Gas and Electric v. Public Service Commission of New York made it clear that truthful commercial speech for a legal product can only be regulated if the regulation (1) serves a substantial government interest, (2) directly advances that interest, and (3) is no more extensive that necessary to serve that interest.

First, the definition of unfairness, as contained in the House bill in the 99th Congress, does not come close to meeting the requirements set forth in Central Hudson. Indeed, it is hard to see how past FTC unfairness ad rule attempts -- like the over-the-counter drug rule that would have required identical language in ads as found on labels to describe uses of the drug -- could have met this test.

Specifically, future Commissions could attempt to censor or severly restrict commercial speech without establishing that the advertising is related to the problem -- or that the ad ban would advance the government interest. Moreover, future Commissions would not have to establish that the censoring of ads -- or other regulations taken in the name of unfairness -- were the least restrictive remedies. Of course, advertisers could go to court to secure their First Amendment rights, but only after protracted litigation at great expense to the government and to industry.

CONCLUSION

The AAF urges the Congress to quickly reauthorize the FTC with the deception authority necessary for vital agency so important to the well-being of the industry and the public. We also urge that the agency be restricted from the use of the unfairness authority in advertising rulemaking. Since 1980, it has been prohibited from using unfairness authority except in individual cases. Reauthorization with this prohibition would merely make permanent the temporary ban on its use that was contained in the FTC Improvements Act of 1980 and that has been extended numerous times by Congress through continuing resolutions. The AAF believes this provision has served both public and Congress well since 1980.

Senator **BRYAN**. Thank you, Mr. Snyder.
Mr. **SILVERGLADE**.

STATEMENT OF BRUCE SILVERGLADE, DIRECTOR OF LEGAL AFFAIRS, CENTER FOR SCIENCE IN THE PUBLIC INTEREST

Mr. **SILVERGLADE**. Good morning. The Center for Science in the Public Interest which I represent is a nonprofit consumer organization. We are supported by more than 160,000 individual dues paying members across the country, and we have been in operation since 1971.

Since that time one of our longstanding concerns has been the regulation of unfair and deceptive advertising. And today I would like to mention three specific matters on that topic.

First, should the FTC's current enforcement priorities in the area of deceptive advertising be reordered? Second, what is the appropriate relationship between federal and state enforcement agencies in this area, and, third, should the FTC retain authority to regulate unfair advertising on an industry-wide basis.

So, first the FTC's current enforcement priorities in an era of limited resources, a regulatory agency has to make doubly sure that its budget is being devoted to truly important tasks. Unfortunately, the FTC has ignored this simple rule and over the last eight years has squandered significant sums on trivial matters that have produced relatively little public benefit.

Now, Chairman Oliver this morning has named off several large companies, such as Campbell's Soup, that the Commission has taken action against. He has not named the smaller ones such as Weidner Health and Fitness, manufacturer of something called Dynamic Life Essence Nutrient Supplements or National Energy Associates, manufacturer of the Cyclematic energy control device, and it is these kinds of cases that have really wasted the commission's resources.

We have repeatedly petitioned the commission to refocus its efforts on deceptive advertising by large national advertisers and occasionally it has. Again, Campbell's Soup and Kraft are two important cases that the FTC has brought. But, generally speaking, the agency is still devoting too many of its resources to true charlatans and fly-by-night companies.

It is interesting that the petitions we filed with the FTC on large national advertisers were all resolved by state attorneys general, while the Commission ignored the overwhelming majority of them, in each case a state attorney general was able to resolve the case. The company paid money to the states as part of the settlement of the case, and the ad was either dropped or significantly qualified by disclosures.

And so I would urge the subcommittee to investigate how the Commission is spending its limited resources. I have some suggestions in my testimony on how to go about doing that. I would like to highlight two of them.

The first is, I think, the subcommittee stirs the commission to issue guidelines in especially problemmatic areas of advertising such as children's advertising, tobacco advertising, alcoholic beverage advertising, food and drug advertising, and so forth.

Bringing cases in these areas is simply an inefficient way to address the problems. The rule applies to the whole industry.

A case applied to only one company and, in fact, if we look back to the 1970s, it was widely accepted in administrative law that rule making and guidance through guidelines was a more appropriate way, a more efficient way.

It gave prospective notice to companies, it did not penalize any single company that was the target of a case, and it was a better way to go. While rule making has proven difficult at the FTC because of procedures that the agency has to follow issuing guidelines may achieve many of those same results.

And, second, the Commission can make better use of its limited resources by encouraging state attorneys general to bring cases against misleading ads by national advertisers, and this brings me to the second topic, the relationship between the FTC and the states.

Contrary to the claims of the advertising industry, state attorneys general have acted in a consistent, unified, and a systematic manner, and the claims about so-called Balkanization of the advertising regulations simply cannot be substantiated. In fact, it is really the FTC that is guilty of inconsistent behavior because it was the FTC in 1982 that rescinded the traditional policy on deception and embarked upon a radical new interpretation of what deceptive advertising is.

The state attorneys general have been applying the traditional law on deception and so if anyone is guilty of inconsistent action, it is the Federal Trade Commission itself.

I think the real reason the advertising industry opposes enforcement by state attorneys general is that they have proven less bureaucratic than the FTC. The FTC is run by five commissioners, and its procedures bog down FTC proceedings for years, sometimes.

In addition, advertisers fear state agencies because the states have stronger laws at their disposal than does the FTC. For example, the FTC typically forces an advertiser to cease and desist from making a deceptive claim, but the states under their state laws have authority to assess monetary penalties. The FTC cannot do that unless an advertiser violates an existing cease and desist order.

And so it is really the fact that states are acting more quickly, more efficiently, and have stronger laws at their disposal. That is why the advertising industry, I think, is frankly afraid.

Any new chairperson of the FTC who is sincere, however, about keeping up the agency's enforcement must recognize that the commission has to rely on the states for assistance. The FTC's budget work years are down 40 percent, and there is little chance because of the federal budget deficit that the agency will ever be given enough resources to do the whole job again by itself. We calculate it would take about $50 million, an additional appropriation of $50 million to restore the commission to its pre-1981 strength, and so we are talking about a lot of money here that is simply not available.

And so if the new FTC is going to beef up enforcement, it has to rely on the states. So, we recommend that this be a true partnership, not one in which the states are simply relegated to go after local advertising, not one in which the states are relegated simply to enforcing existing FTC rules on funerals or used cars, but one where the work is really divided up equally.

For example, the states have issued guidelines for rental car advertising. That is an area that they should continue to be active in since they have established expertise in the area.

I know my time is up. I would just like to mention one thought on unfair advertising. There is, of course, the issue is whether the FTC should retain authority to issue rules in the area.

The Surgeon General concluded just last week in the area of beer advertising that the industry has been targeting young people and that this type of advertising has contributed to a grisly death toll from alcohol problems, and this is the type of problem which does not involve deceptive advertising.

It is the type of problem that is industry-wide throughout the beer industry, and it is the very type of problem where the FTC needs to use its unfairness authority. It needs to have that authority available to act. Thank you.

[The statement follows:]

STATEMENT OF BRUCE SILVERGLADE, DIRECTOR, LEGAL AFFAIRS, CENTER FOR SCIENCE IN THE PUBLIC INTEREST

Good morning. I am Bruce Silverglade, legal director of the Center for Science in the Public Interest. The Center is a non-profit consumer organization. We are supported by approximately 160,000 individual dues paying members located across the country.

One of our long-standing interests concerns the regulation of unfair and deceptive advertising.

In regard to this matter, I would like to address three issues:

- Should the FTC's enforcement priorities in the area of deceptive advertising be reordered?
- What is the appropriate relationship between federal and state enforcement agencies in the area of deceptive advertising regulation?
- Should the FTC retain authority to regulate unfair advertising practices on an industry-wide basis?

ENFORCEMENT PRIORITIES

Mr. Chairman, in an era of limited resources, a regulatory agency must make doubly sure that its budget is being devoted to truly important tasks. Unfortunately, the FTC has ignored this simple rule and has squandered significant sums on trivial matters that produce relatively little public benefit.

Many of the companies that have been targets of FTC enforcement action do not sound even vaguely familiar. For example, I do not believe any of us have even heard of companies such as National Energy Associates, manufacturer of the "Cyclematic" energy control device or Weidner Health and Fitness, manufacturer of "Dynamic Life Essence" nutrient supplements. The truth of the matter is these targets of FTC enforcement actions are relatively small operations. While they have undoubtedly engaged in deceptive advertising, they represent a rather small threat to consumers due to the relatively small scale of their businesses.

We have repeatedly petitioned the Commission to re-focus its efforts on deceptive advertising by much larger advertisers -- including companies such as Kellogg, McDonald's, Coca Cola, and numerous others. While the Commission has occasionally taken enforcement action against some of these advertisers, such as Campbell Soup and Kraft, Inc., it still devotes a disproportionate share of its enforcement resources to targeting ads by small firms. This does not mean that the major national advertisers we complained of were not engaging in deceptive advertising. In fact, each of these companies was alleged to be engaging in deceptive practices by state attorneys general. Each of these companies' ad campaigns was either modified or discontinued, or the advertiser was required to disclose information necessary to dispel misleading impressions left by the ads.

One must ask then, why is the FTC insisting on using a large share of its resources to target small fry? It appears that the Commission's rather odd enforcement record is a result of a deregulatory philosophy so extreme that it often allows all but true charlatans to escape the grasp of the Commission's regulatory authority. Whatever the cause, the result is certainly ironic -- the agency that has prided itself on cost/benefit analysis is wasting its resources on matters of little significance.

I would add, Mr. Chairman, that consumer organizations are not the only ones upset about the Commission's skewed priorities in the area of advertising regulation. Surprisingly, the advertising industry itself has joined the call for a more active and relevant FTC.

It seems that advertisers fear the growing trend towards state regulation of national advertising that has occurred as a result of the Commission's abandonment of its traditional regulatory role. Advertising Age, a leading industry magazine, has called on its editorial pages for a FTC "active enough, vigilant enough to arrest [what it called] this disturbing drift towards piecemeal, crazy quilt, state by state regulation of national advertising."

The advertising community is also concerned about the effect that FTC inaction has had on the industry's self-regulatory programs. For example, the three major television networks operate standards and practices offices which, among other things, are responsible for weeding out misleading television commercials before they get on the air. In recent years, these offices suffered severe staff cutbacks. I would also add that the National Advertising Division of the Council of Better Business Bureaus is handling about 1/3 less cases than it has in previous years. One reason for these cutbacks is that many members of the business community no longer believe they need to spend money on self-regulation because prohibition of deceptive advertising is no longer a top federal priority.

Advertising industry executives, however, are concerned that the incidence of deceptive claims will surely rise. The American Association of Advertising Agencies has gone so far as to object to cutbacks in self-regulation by the television networks.

It is clear to almost everyone, except the FTC, that the advertising industry needs regulation. Consumers overwhelmingly believe so. According to a survey reported recently in The Washington Post, 33.4% of consumers believe that advertising is misleading, the highest percentage ever recorded during the five year history of the survey cited. According to the Roper poll, 76% of Americans believe that the government should be making a greater effort to establish more controls on the way products and services can be advertised.

It takes great ingenuity for a federal agency to create a policy that pleases no one. But our hats are off to the FTC for creating this truly Rube Goldberg design.

Mr. Chairman, I urge this subcommittee to investigate how the Commission is spending its limited resources in this area -- on behalf of consumers, on behalf of the advertising industry, on behalf of all of us who are concerned with efficient government management.

We urge the Subcommittee to direct the FTC to:

- Refocus its enforcement efforts on deceptive advertising by large, not small, companies;
- Reestablish a large enough presence in the field to provide an incentive for self-regulatory authorities to maintain their traditional efforts to regulate deceptive ads without federal involvement;
- Respond to the public's concern over the way that specific products can be advertised by issuing prospective guidelines in especially problematic areas

such as children's advertising, tobacco advertising, alcoholic beverage advertising, food advertising, and drug advertising;

- Augment the Commission's scant resources by encouraging state governments to bring cases against misleading ads by national advertisers.

RELATIONSHIP BETWEEN FEDERAL AND STATE ENFORCEMENT AGENCIES

This last recommendation brings me to my next topic -- the relationship between the FTC and the states in the area of deceptive advertising enforcement. As I've noted, the states have practically become the chief enforcers of our laws prohibiting deceptive advertising. In addition to the cases I have highlighted, state attorneys general have also issued guidelines for airlines and rental car ads and are now reviewing health claims by major food manufacturers. Contrary to the claims of the advertising industry, state attorneys general have acted in a consistent, unified, and systematic manner. Thus, the industry's cries about so-called "balkanization" of advertising regulation cannot be substantiated.

The real reason the advertising industry opposes enforcement action by states is that state officials have proven to be more aggressive enforcers of our consumer protection laws than the FTC. State agencies are less bureaucratic than the FTC, and act more quickly and vigorously than an agency run by five different commissioners. For example, the FTC worked unsuccessfully from 1976 to 1982 to develop advertising guidelines for foods. In contrast, the states were able to develop advertising guidelines for the airline and car rental industries in about a year.

Advertisers also fear state agencies because the states have stronger laws at their disposal than does the FTC. For example, in contrast to the FTC which often only forces an advertiser to cease and desist from making deceptive claims, many states have authority to assess monetary penalties. Nine states, for instance, in an action taken against Campbell Soup, required the company to pay $315,000 in costs as part of an agreement to halt certain advertising claims. The FTC could only obtain such sums if an advertiser violated an existing cease and desist order, which does not occur frequently.

Any future chairperson of the FTC who is sincere about beefing up the agency's enforcement program will need to recognize that the Commission must rely on the states for assistance. The FTC's staff over the last eight years has declined greatly -- by approximately 40% -- and there is little chance, because of the federal budget deficit, that the agency will ever be given enough resources to do the whole job by itself. It would take an additional appropriation of approximately $50 million to simply restore the Commission to its pre-1981 strength. The American Bar Association's Report on the

FTC recognizes this point but recommends "the states' primary mission should be those practices that harm consumers within a single state; the FTC's special mission should be those practices that harm consumers in many states." While this statement seems logical on its face, it ignores the relative resources of the states and the FTC and the incidence of deceptive advertising on an intrastate as compared to an interstate level.

As stated elsewhere in the ABA report, the number of FTC workyears devoted to advertising practices has declined steeply. Although no one to my knowledge has compiled similar figures tracking the increase in workyears devoted to advertising regulation at the state level, one point nonetheless is clear. The states have more resources available to attack deceptive national advertising than does the FTC. Thus, the ABA's statement that the states' primary mission should be those practices that harm consumers within a single state would be valid only if it could be demonstrated that it is necessary to devote greater resources to prohibit deceptive intrastate advertising than deceptive interstate advertising. Since the ABA report does not even purport to address this issue, its recommendation that most of the available resources in this country should "ideally" be devoted to the area of intrastate advertising is dubious.

The states have earned the right to become permanent players in the field of national advertising regulation. They have proven that they can do the job in an effective, efficient, and uniform manner and that together, they can muster resources that are simply unavailable on the federal level.

Accordingly, there needs to be a new partnership between the FTC and the states. This partnership should be one in which:

- resources are allocated flexibly and not limited by rigid standards such as state boundary lines;
- both federal and state agencies recognize that each has particular expertise in specific areas of national advertising regulation and each should remain primarily responsible for taking enforcement action in those areas;
- state and federal agencies work together to strategically plan enforcement priorities in the area of national advertising.

The new chairperson of the FTC should make it a top priority to meet with state officials and jointly draft a memorandum of understanding reflecting these policies.

FTC AUTHORITY TO REGULATE UNFAIR ADVERTISING

The last topic I wish to address concerns "unfair" advertising. As you know, Mr. Chairman, the Senate has supported amendments to the FTC Act that would permanently bar the agency from using its rulemaking authority to regulate unfair advertising. If enacted, this provision would make it difficult for the Commission to effectively remedy industry-wide advertising practices that threaten the health and safety of consumers.

The American Bar Association report on the FTC called for retention of the agency's unfairness authority. The FTC's unfairness authority allows the agency to address a number of advertising practices that are not necessarily deceptive, yet which raise serious concerns. For example, the FTC prohibited an advertiser of razor blades from promoting its product by inserting a free sample blade in the comic section of metropolitan Sunday newspapers. The Commission found that it was an "unfair" advertising practice to insert a razor blade in the Sunday comics, where young children might find the blades and be injured. In other cases, the FTC prohibited advertisers from depicting dangerous conduct, such as a young child cooking food on a stove or using an electrical appliance near water. These advertisements were viewed by children who might imitate the unsafe behavior and, hence, were prohibited.

In future situations, the Commission may determine that such practices are prevalent throughout an industry. Yet under prior Senate versions of the FTC reauthorization bill, the agency would be prohibited from taking effective industry-wide action to bring such practices to a halt.

Just last week, the Surgeon General concluded that the beer industry's practice of targeting advertising to young people contributed to this nation's grisly death toll from alcohol. Yet, if the FTC is stripped of its authority to regulate unfair advertising, it would not be able to act effectively against the very types of ads that the Surgeon General considers to be a problem.

A special exemption for advertisers from FTC unfairness jurisdiction is unjustified and discriminatory. There is no reason why advertisers should be granted special privileges to engage in unfair business practices on an industry-wide basis. Advertisers claim they deserve an exemption because the FTC has abused its authority in the past and infringed upon their industry's rights under the First Amendment to the United States Constitution. While we disagree with these contentions, we note that the Supreme Court, the FTC, and Congress have all taken steps that would protect advertisers from any purported abuses in this area.

First, the Supreme Court, in Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), has defined the limits of constitutionally protected speech. See, Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico, 106 S. Ct. 2968 (1986). In Central Hudson, the Supreme Court announced a four-part test that would prevent the FTC from abusing its authority to restrict "unfair" advertising. This test first requires agencies such as the FTC to determine whether an advertising claim is true or false. If the advertising is technically true, but still objectionable, the Commission cannot act unless it determines:

- A substantial government interest would be served by restricting advertising;
- The restriction would "directly advance" the public interest;
- The restriction would not be overly broad and lesser remedies would not be sufficient.

Second, the FTC itself has adopted a formal statement of policy explaining how it intends to further limit the use of its authority to restrict "unfair" business practices. Before the FTC acts against any "unfair" practices, it must demonstrate that:

- The practice causes substantial economic injury to consumers,
- Consumers cannot reasonably avoid the injury themselves, and that
- The costs of the practice outweigh any countervailing benefits of the practice.

The Senate version of last year's reauthorization bill would have codified this policy and made it a part of the FTC Act.

Thus, limitations already imposed by the Supreme Court and the FTC itself all ensure that the Commission will not abuse its authority to restrict unfair advertising. Such authority must be preserved so that the FTC can continue to act against industry-wide advertising practices that threaten the health and well-being of all Americans.

I would like to thank you for this opportunity to testify and would be pleased to answer any questions.

CSPI CENTER FOR SCIENCE IN THE PUBLIC INTEREST
Publisher of *Nutrition Action Healthletter*

June 30, 1989

Honorable Richard H. Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science and Transportation
United States Senate
Washington DC 20510-6125

Attn: Kevin Curtin

Dear Senator Bryan:

I am pleased to provide the following answers to the questions presented in your letter of June 12th.

Question 1: The Kirkpatrick Committee report stated that the FTC can and should do more to articulate its advertising law-enforcement agenda. Would you agree with that statement? If so, in what particular areas should the FTC define its agenda more precisely?

Answer: I agree with this recommendation of the Kirkpatrick Commission. The FTC should give priority attention to identifying it's law enforcement agenda more precisely in the areas of cigarette advertising, alcoholic beverage advertising, children's advertising and food and drug advertising. These areas of advertising all involve important public health issues, yet during the 1980's, the FTC has failed to develop coherent strategies to deal with problems stemming from such advertising. In the areas of cigarette and alcoholic beverage advertising, the FTC has completely failed to develop any strategy for dealing with ads aimed at underage youths. In the food and drug area, the FTC has concentrated most of its resources on challenging advertising claims by relatively smaller companies and has ignored misleading claims by the largest members of the industry. In the last two years, the FTC has begun to challenge claims by a few major food manufactures, such as Kraft and Campbell Soup, but still continues to devote substantial resources to ads by smaller companies as well.

Question 2: I am aware that the advertising community is concerned about proposals to give the attorneys general more authority over some consumer protection activities. The attorneys general have been especially active recently about airline advertising practices. Do you feel that the attorneys have acted because the FTC has failed to do so? What benefits or detriments does this activity by the attorneys general produce?

Answer: In general, the attorneys general have become more active in the area of national advertising regulation because the FTC has failed to act. This trend began, in part, when my organization failed to receive any positive response on numerous petitions for enforcement action that we filed with the FTC in 1982 and 1983. After failing to obtain enforcement action by the FTC, we submitted copies of our petitions to state attorneys general. Initially, we worked with officials from the New York attorney general's office, but in later years, we worked with officials in Texas, California and other states. Beginning in 1985, the state attorneys general began forming multi-state task forces to address the issues raised by CSPI petitions originally filed with federal agencies.

In the area of airline advertising, I would note that the Department of Transportation, not the FTC, retains jurisdiction over airline advertising. However, the reason for the involvement of the state attorneys general in this area of advertising regulation is the same. Attorneys general became involved with airline advertising only after DOT failed to develop an adequate strategy for controlling abusive price advertising claims spurred by the deregulation of airline fares.

There are many benefits from the activities of the attorneys general in the area of national advertising. First, even if the FTC had the desire to beef up its enforcement activities, it would find that it no longer has the resources to do the whole job by itself. During the 1980's, the FTC has lost more than 40% of its resources. Therefore, the states play an indispensable role in supplementing the FTC's necessarily limited activities.

Second, consumers and honest advertisers benefit from enforcement actions by the state attorneys general because the states often have stronger laws at their disposal than the FTC. Under the FTC Act, the FTC cannot assess a civil penalty upon an advertiser who disseminates unfair or deceptive claims, unless that advertiser is violating an existing cease or desist order. In contrast, state laws do not generally give dishonest advertisers "one free bite at the apple". Monetary penalties collected by the states, sometimes exceeding $300,000, provide an important deterrent not present under federal law and provide sums that can be used for consumer education purposes.

Third, state attorneys general have shown that they can act more quickly than an agency run by five different commissioners. For example, the states developed enforcement policy guidelines for the airline industry in about one year, while the FTC took more than five years to development similar guidelines for other industries.

Trade associations representing the advertising industry claim that enforcement activity by the states will lead to the "balkanization" of advertising regulation. Yet, the state attorneys general have demonstrated that they can act consistently, in a coordinated, uniform fashion. The advertisers real fear is simply aggressive enforcement action by state attorneys general who have stronger laws at their disposal than does the FTC.

Question 3: In a paper last year, your organization called on the FTC and state attorneys general to enter into a memorandum of understanding, delineating their responsibilities. Why do you think this is a good idea? How would you suggest responsibility be divided?

Answer: In general, it makes sense from a public management standpoint to ensure that federal and state agencies clearly understand their respective responsibilities in any given area where they share joint responsibilities. Any memorandum of understanding between the FTC and the states should make clear that the attorneys general and the FTC share responsibility for regulating national advertising. Any attempt to relegate the states to purely intrastate matters would be counter-productive. Rather, responsibilities should be divided according to expertise. For example, the states have developed significant expertise in the areas of airline and rental car advertising. They should retain authority for regulating these areas.

Question 4: Do you favor requiring that activities be "prevalent" in an industry before the FTC be permitted to do a trade regulation rulemaking? If so, how would you define "prevalent."

Answer: No, the FTC should not have to meet this requirement. The FTC may wish to act prospectively to halt potentially unfair or deceptive practices before they become "prevalent" within an industry.

I appreciate this opportunity to express the views of CSPI on these important subjects.

Sincerely,

Bruce Silverglade

Bruce Silverglade
Legal Director

Senator **Bryan**. Thank you very much, Mr. Silverglade.

Let me begin with a question to you, if I may. You have quarrelled with the allocation of resources by the agency, setting as your premise the finite resources and the unlikely prospect that those would be greatly expanded. Is that not essentially a subjective internal sort of thing? How do we in the Congress address that problem?

And maybe a lot of us would agree with you, that some of those resources have been misplaced or misspent, but in terms of crafting a piece of legislation, how do we so with some definitive guidelines, other than just to say, use your resources wisely, where they have greater impact or greater application or scope? Could you address that please?

Mr. **Silverglade**. I think this committee could instruct the FTC to investigate particular areas of deceptive or unfair advertising. It has done that in the past. They have taken a look at insurance practices, for example. There are many specific instructions to refrain or to engage in certain types of investigations.

And perhaps with being pointed in the right direction on a few specific areas, this subcommittee could accomplish that objective.

Senator **Bryan**. Mr. Silverglade, would you agree with the criticism which I questioned the chairman about, that it is the lack of action on the part of the FTC that has created much of the activity on the part of the attorneys general to occupy a vacuum, to take aggressive action in those areas in which, seemingly, the FTC has declined to act for whatever reason?

Mr. **Silverglade**. I certainly would agree with your observation. I think the advertising industry, and even the American Bar Association report, talks about an appearance of inaction. It seems everybody is well aware of this. Advertising Age Magazine has editorialized for a more active FTC. So it seems like the industry and other forums recognize this very much so, the point you made.

Senator **Bryan**. And that is a nice lead in to a question of Mr. Jaffe. I think you used the word atrophy, if I recall from your testimony—I think you also used the word vacuum. Is it your view that failure to act on the part of the FTC has almost invited response, some of it unwelcome from your point of view, on behalf of the attorneys general?

Mr. **Jaffe**. I think that the FTC has been more active than people have suggested; that if you go over the list of cases that they have initiated, there is a fair number of major national advertisers they have gone after.

The use of atrophy in my statement, was meant to suggest that if we continue to allow the agency to contract, as far as resources are concerned, they are going to have to release more people, and that this will create a dangerous situation for them to be able to effectively cover the market place.

I do not believe that you can hand this issue over to any other group, other than a national regulator; if the FTC is not, in the Congress' view, doing enough, then the Congress has to do something directly with the FTC. Because, as Dean Pitofsky said, it is just very hard for 50 states and 50 separate legislatures, all looking at national advertising that is shown everywhere, to each separately decide what is the meaning of a particular ad, and then to regulate it in such a way that does not cause inconsistency.

There is also the danger that recently came up in the airline advertising area, where the states had a regulation that was found to be in violation of federal preemption.

So, I think that you are going to run into a problem where there is nobody but the FTC who can do this job; and therefore you have to come to the FTC and see that they have both the resources and if the Congress feels that there are particular areas that need more focus, direction from the Congress and demand from the Congress for more action. But you cannot say we are unhappy with the FTC so we hand it off to the states, and then the problem will be solved. What you will have is Balkanization; it is inevitable.

We can show you all sorts of instances at the state level, where there are inconsistent rules that make it virtually impossible for a national advertiser to operate. And if this situation keeps increasing, it will become a much more serious problem as time goes on.

Senator BRYAN. I am sure, Mr. Jaffe, that the attorneys general will argue tomorrow that they have taken action in given cases, where the FTC has failed to act or has had a lack of resources to act, and have, in point of fact, secured consent agreements, settlements, stipulations. Although these may not in the legal sense be an admission of deception, but in a pragmatic sense, that practice ceases, and, in some instances, damages have been awarded. It seems to me that they are going to argue that they have done a pretty good job in that area. And indeed it has been difficult to get the FTC to be energized.

Can you respond to that line of reasoning?

Mr. JAFFE. Well, I guess we can say one thing and they can say the other. What they have tried to do, I think what they will also say tomorrow, and I think it is an important thing to take a very close look at, is that they are trying to harmonize their activities; that they have gone to guidelines. When you look at the guidelines, what they say is these are merely guidelines, these are not laws; we are not going to enforce the guidelines; these are just merely restatements of the law in the 50 states.

The Federal Trade Commission has clearly said that that is not so. The Kirkpatrick Commission, which was a very broad group, covering the whole political spectrum, has looked at this issue and said that the states, in fact, have been excessively intruding into the national regulation area, and that they are doing things in some areas that might make it more difficult for there to be price advertising, rather than to help consumers.

So, we think that the guidelines do not really accurately state what is the law in the 50 states. We think that some of the requirements, as Mr. Snyder said, would actually make price advertising much more difficult, and make price advertising within 30 seconds in an ad impossible. Which I do not think is in anybody's interest, and that, in some instances, in the airline area in particular, rules have been struck down as hitting federal preemption. We do not think that is the proper direction.

Let me give you a couple of other examples of our concerns. In West Virginia, they now have a proposal that they are trying to put into effect that would allow you to have no limitation on any price advertising. In other words, if you have a price statement, you could not have an asterisk or any other limitation on that price. They are just saying any restriction is per se, deceptive.

Well, that is a very difficult thing, because there are often instances where there may be two or three or four groups that are not taking part, or there may be some geographical area in which that particular price is not being offered.

National advertisers cannot be dealing with that kind of situation across the country with a multitude of special rules. They have to be able to make some limitations.

In the same sense, there is the rule in Massachusetts where they are saying that you have to have all material information necessary for a consumer to make a decision to be put in an ad. Well, as we pointed out, that sounds nice until you look at it closely. You would need more than the Encyclopaedia Brittanica on a lot of products, because, let us just take an automobile: energy conservation, crashworthiness, styling, speed, all those things may be material to some consumer. Do you have to pour all that into an ad. If you do, that is the end of advertising as we know it.

These are real examples; these are not things that we are just creating or saying, don't regulate us. We believe the FTC should go after false and deceptive advertising if it is there, if it is done by our members or anybody else, it should be cracked down upon.

But, on the other hand, we are saying if you try to pass it over to the states, we are just going to have regulatory confusion. It is inevitable. And it is not even ill will. We are not saying the attorneys general are men of ill will, many of them are very intelligent, but different groups with different—I would say they are all very intelligent.

Senator BRYAN. Your correction will be noted for the record, Mr. Jaffe.

Mr. JAFFE. But working separately in various states with different state legislatures, they are going to have different rules. And we have to advertise in every state. That can become almost impossible.

Senator BRYAN. Assuming, without conceding, that the attorneys general have been to aggressive in some areas, where do you draw that line? I think that is the difficulty that I am having in understanding.

I appreciate what you are saying, that attorney general X in state Y may be pushing for a rule which may be totally at odds with a rule that another attorney general is pressing in another state. And a national advertising campaign needs to be harmonized or it is virtually impossible to implement.

I understand, I think, the thrust of your message, but where do we draw the line? How do we, from a structural point of view, and I would throw it out to you, Mr. Jaffe or Mr. Snyder, where do we draw the line in terms of crafting this piece of legislation that helps to give us some definition as to what areas of jurisdiction each should occupy?

Mr. JAFFE. Well, let me say something, and maybe Mr. Snyder would want to add to this. I think the first thing is that the national regulators should have primary responsibility in regulating national commerce, including advertising. You are going to have a bill before you, I understand it, that will deal with the telemarketing issue.

Last year we testified that, first, we thought that you should give the FTC increased power in that area to operate effectively.

If you believe that in some specific area the FTC does not have adequate authority, then you should allow the FTC to deputize the states attorneys general and have the FTC have control over that issue so that you can keep some harmonization. I think that should be done very carefully on a case-by-case basis, and only after a finding that the FTC, for whatever reason, does not have the ability to do it on its own. But, at least a national regulator; somebody that you and the other congressmen and senators have control over is setting up those rules.

Senator BRYAN. Is that an argument for preemption, Mr. Jaffe?

Mr. JAFFE. I think if the states continue down the road in which they are heading, that there will be a need for increased federal preemption. Because I think they will make it impossible for efficient advertising of products in this country. And that is against anybody's interest.

Let me show you more specifically what I mean. You know, some people are saying, "Well, wait a second. There should be states' rights, and the states should be able to protect their members from being deceived," which I do not think anybody disagrees with.

What is really happening is putting states' rights on its head. Because the state with the strongest regulation is now going to start creating the law of the land. Let us say your legislature in Nevada had looked at a specific issue and decided that that should not be done. But some other state, let us say New York, looks at the same issue and says it should be done. For a national advertiser, they will be imposing their rule on your state.

In other words, what the national advertiser must do in this situation is to go to the harshest rule, and that will become the law of the land. Or he has to regionalize. That is his only choice.

Senator BRYAN. The lowest common denominator?

Mr. JAFFE. The lowest common denominator rules.

Senator BRYAN. Mr. Snyder, would you want to take a cut at that?

Mr. SNYDER. Yes. I think one place the line might be drawn is as between where ads are attacked for what they say, and where ads are attacked because of their failure to include information. And I think this is where our biggest disagreement is coming down with the state AGs in the guidelines.

Because for 20 or 30 years, I think a policy developed in advertising law and at the federal level, held that only the most material information needed to be included in ads. And it also recognized, as I said a moment ago, that labeling for foods and drugs and point-of-sale provided the opportunity for consumers to get more information.

Now, I think the line has been blurred on that, because I think the states have moved and have wanted to include new types of disclosures, new types of warnings. And this is where it is most difficult for national advertisers to contend with different state requirements.

Now, I think that could be crafted; I know it is difficult. But it seems to me that when guidelines and rules issued that specified the types of information that have to be disclosed in ads, we have to have one central authority, whether it is the FTC for advertising or the FDA for labels. Because if we do not, we are going to have consumer confusion, as well as the inability to advertise.

Almost 95 percent of network television ads are now 30 seconds or less. I mean that is the economy of the thing. And yet, some of the disclosures that we are contending with are 29, 30, 40 words long. And that is going to chill price advertising and other types of important claims. And the consumers will not benefit from it.

So I would try to draw the line along that important axis.

Senator **Bryan**. Let me ask you one other question, Mr. Snyder. The definition which this committee came up with in the last session of Congress on unfairness in the authorization bill that was processed through this house, any quarrel with that?

Mr. **Snyder**. Well, we supported the legislation in the Senate last time. And as for individual cases, and of course in fairness, it is limited to individual cases, that definition I think is workable, except there is one major problem. And that is, when you try across the board, with rules certainly, to predict what it is in an ad that is going to cause this unfair practice, what it is in the content, it is just almost impossible to link this advertisement to some unfair final action.

The test is an effects test. I mean it says if there is economic injury. But, as long as unfairness is only permitted for unfairness, then I think that definition is workable. You know, we do not think it would be workable for rules. And, of course, in the House last year, there was no definition at all.

Senator **Bryan**. Mr. Jaffe, you would agree with Mr. Snyder; would you?

Mr. **Jaffe**. ANA's position has generally been that unfairness should not be the standard used in regulating in the advertising area. What I would say, however, is that we also supported the Senate bill last year as the only feasible compromise that we thought had any hope of moving forward.

We do think there is a difference between unfairness being used on a case-by-case basis. At least you are targeting a specific problem. You say, this specific factor in this specific ad is unfair. And at least you are putting people on notice.

What the problem was in the children's area, they said all children's advertising per se, as a category, is unfair; however truthful the advertising was, however non-deceptive it was, and however safe and appropriate the product was. If it was a baseball glove, if it was apple pie, maybe apple pie has sugar in it, so I do not know if that is a safe example; nothing is considered completely safe these days. As long as you are having that kind of targeting on a case by case basis, at least people know what you are talking about. And you can argue about it and build up a body of knowledge about what is unfair.

Also, which was mentioned in the last two panels, if a particular case is brought, the industry does notice. The lawyers do notice. And if it is directly applicable to their ads, then through section 5(m)(1)(b) it can be extended to these other companies.

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26 July 1989

The Honorable Richard H. Bryan, Chairman
Consumer Subcommittee
Committee on Commerce, Science & Transportation
United States Senate
Washington, D.C. 20510-6125

RE: Federal Trade Commission Re-authorization Testimony
7 June 1989

Dear Chairman Bryan,

This letter replies to your additional questions about the Association's position on the FTC Re-authorization. As you requested, I restate your question before responding.

Q: In the past, your organization recognized the possibility that concerns about insurance might reach such a magnitude that the FTC should investigate, and then Congress would request that study. Is that still your position? If so, your testimony suggests the situation has changed for liability insurance such that a study is no longer necessary. Can you cite examples of when a study would be desirable, and in what areas of interest?

RESPONSE: The AIA's position remains that the regulation of insurance is the responsibility of state -- not federal -- regulators. As a former governor, you are aware that insurance is comprehensively regulated at the state level. The 1980 amendment to the FTC authorization expanded the FTC's ability to conduct studies and prepare reports relating to the business of insurance upon receiving a request from a majority of the members of either of the congressional commerce committees. The provision was intended to discipline the FTC from a pattern of unauthorized investigative activities into various aspects of the business of insurance. As I stated in my testimony, there is no good reason warranting an FTC study of liability insurance now, and I cannot cite an example of an area which would benefit from FTC study at this time. I would be glad to consult with you and your colleagues on the committee or with your colleagues on the House commerce committee on any insurance issue of concern to you.

Q: The 1980 limitation on the FTC's insurance authority restricted its investigations into the "business of insurance". Does this mean that the FTC cannot study any aspects of insurance, or is it your position that the FTC may

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ROBERT E. VAGLEY
PRESIDENT

So it is only in situations where there is a real difference between ads would a company be able to come in later and say, "Hey, that is different for this ad. That rule you just had over there does not really apply to us."

Senator **Bryan**. Let me give Mr. Silverglade a chance to make a final statement.

Mr. **Silverglade**. Well, thank you.

I just want to emphasize again that is has been the FTC over the last eight years that has been acting inconsistently. The states have been applying traditional deception law; that is why the results have been different from the actions the FTC took, because the FTC has been applying a radically different deception standard.

I think if we want to ensure consistency between the FTC and the states, let us write into the reauthorization bill the traditional law of deception: Having a tendency of capacity to mislead consumers. And just by law, force the FTC to dispense with this radical new interpretation that it developed and tried to implement during the last eight years.

Just a few other points. One state attorney general may bring a case that establishes a precedent that is not reflected by other states, and Mr. Jaffe has said that an advertiser would have to comply with that nationwide. And that is because it is the highest common denominator, not the lowest common denominator. And I have to ask what is wrong with asking an advertiser to obey the highest common denominator, the highest ethical standard, the highest standard of fair dealing in the country that may have been issued by a single state?

And just another point of contention here. Mr. Snyder has mentioned that the states do not accept labeling as a source of information. In other words, the states are insisting that more information be in the ad and will not allow the advertiser to argue that the information is on the label. That has never been the law. That has never been the law on the federal level.

There is something called the first contact's doctrine, which has said for years that all the information has to be in the ad; you cannot say, "My ad is not really truthful, look at the label to find out the whole truth." That has never been the law.

Senator **Bryan**. Gentlemen, we appreciate it. We could go on for some period of time. There are going to be some follow-up questions that I am sure members of the subcommittee would have, and we would appreciate your answers to those, just as you have shared your answers with us today.

Mr. **Snyder**. I want you to know, Mr. Chairman, we are also talking with the National Association of Attorneys General and individual AGs about this issue. And we, I think, have started a very good dialogue with them as well.

Senator **Bryan**. I think that is helpful. I do not think referring to them as counterrevolutionaries is likely to open the kind of dialogue that is going to be constructive here for anyone, frankly.

Mr. **Snyder**. Those were not our terms.

Senator **Bryan**. Thank you very much.

All right. Our final panel this afternoon will consist of Mr. John Satagaj, who is the president of the Small Business Legislative

Council; and Mr. Craig Berrington, who is general counsel for the American Insurance Association.

Mr. Satagaj, would you proceed.

STATEMENT OF JOHN S. SATAGAJ, PRESIDENT, SMALL BUSINESS LEGISLATIVE COUNCIL

Mr. SATAGAJ. Thank you. My name is John Satagaj, and I am president of the Small Business Legislative Council. The Council is a coalition of over 95 professional and trade associations. We are an independent, permanent group of organizations and have been in existence for about 12 years.

We are rather unique among the small business groups for our interest in antitrust policy, in general, and enforcement by the FTC.

We have talked much today about consumer protection. We view the role of the FTC, in addition to consumer protection, to protect and preserve the small business community by ensuring fair competition.

We have appeared many times before this committee and in other forms to discuss the FTC and antitrust policy. Our interest basically stems from our view that we need a strong and vigorous FTC, and strong and vigorous antitrust policy.

I will not go into anything, really, in my testimony. I just want to hit, basically, two points.

One is, we agree with Chairman Oliver. He has been very outspoken on the subject of insurance matters. By and large, we are in general agreement with the Chairman as far as what we need to do regarding the insurance industry and oversight of the industry.

But the area that I am most interested in today is antitrust policies, specifically the Robinson-Patman Act.

As you might guess, over the years of the Reagan administration, quite candidly, we had very few disagreements with President Reagan on policy issues as they affect small business.

However, I must admit that in one area we consistently disagreed with the Reagan administration and it was how we enforce our antitrust policy, and specifically, how we enforce the Robinson-Patman Act.

We hope with the beginning of a new administration that we could start anew with a different direction, particularly, at the FTC and the Justice's Civil Division.

I have looked for a way today to bring this all home. When you represent small business, there are some issues when it is quite easy to say, "I represent small business."

Take, for example, section 89. As you know, in yesterday's debate, clearly, the positions of small business were understood and it is easy to represent small business.

However, when you get into an area like Robinson-Patman or antitrust, you become more of an advocate, rather than representing the interest, in the sense that I could not probably fill this room with enough small business people who thoroughly understand Robinson-Patman and antitrust. And I readily admit it, because it is not something that affects them every day, and they cannot see the bottom line.

As a result, every once in awhile you need to find your compass to make sure you are on that track. Therefore I will just relate to you a story.

I recently had the opportunity to address one of the SBLC's newest members. It is called the Council of Fleet Specialists.

The Council of Fleet Specialists are the folks who distribute truck parts to repair and replacement facilities. Basically, it is the after market for this type of material and parts.

I went to their meeting, and in fact, it happened they were holding their annual meeting in your state.

Unbeknownst to them, I sat in on an earlier session before I was to speak. I listened to roughly 200 small business owners, all independent distributors.

I must say I came back with a renewed feeling about what we need to do in Robinson-Patman antitrust policy because I listened to 200 small business owners talk about the difficulties of surviving in the marketplace, and their concern that there will not be an independent distribution system in this country, unless we continue to enforce the rules.

When it was all said and done, I would think that if you took a poll in that room you would find 200 people, small business owners, who would say, "Yes, we need a strong and vigorous FTC, and we need to enforce the Robinson-Patman Act." But at the same time, you would say, they would tell you it is not being done right now. I guess that is a message with which I came back.

I felt good. The compass swung back into place, and I can say, "Yes, we need to do something."

So that is my message today, Mr. Chairman. We have talked about a lot of other things here today, but I just want to bring that one to your attention.

Thank you.

[The statement follows:]

STATEMENT OF JOHN S. SATAGAJ, PRESIDENT, SMALL BUSINESS LEGISLATIVE COUNCIL

Thank you for the opportunity to appear before your Subcommittee considering FTC funding and proposals regarding its powers and jurisdiction. On behalf of the Small Business Legislative Council, I am pleased to have an opportunity to present to you our views concerning the importance of a strong, vigorous FTC to a healthy, competitive small business economy.

As you may know, the Small Business Legislative Council (SBLC) is a permanent, independent coalition of nearly one hundred trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of over four million small businesses in manufacturing, retailing, distribution, professional and technical services, construction, transportation and agriculture. A list of our members is attached.

Because of our interest not only in free and open, but also fair competition, we have a vital stake in the future and operations of the Federal Trade Commission. As you know, legislation which created the FTC was approved by Congress in September 1914 after three political parties supported the creation of this agency. The central feature of the FTC Act - its grant of authority to take action against corporations and persons engaged in undefined "unfair methods of competition and deceptive acts and practices" was included in the Act to help preserve small business entities from the predatory practices of larger corporations and stop predatory practices in their incipiency.

Mr. Chairman, the Federal Trade Commission has served the public interest well at a minimal cost to the taxpayer. This relatively small federal agency has over the years defined many unfair methods of competition and deceptive acts and practices that inflict injury on the public, as well as to small business concerns. This is why SBLC earnestly supports and advocates a strong FTC.

In 1986, 1800 representatives of small business throughout the country attended the White House Conference on Small Business to determine those legislative objectives that are most desired by business concerns. Antitrust enforcement was a priority included in the final recommendations of the Conference. Likewise, antitrust enforcement has always ranked as one of SBLC's top priorities.

The Commission has a wide array of law enforcement tools at its disposal and compliance with the law requires that businesses know what is expected of them and that consumers know their rights. SBLC firmly believes the majority of business firms voluntarily comply with the law. The Commission should continue placing high importance on clarifying rules and educating businesses and consumers. But, of course, FTC enforcement is necessary in those circumstances where a person is unwilling to comply or an order is necessary to prevent future violations. Business and consumers must know that the FTC will take strong enforcement action in such circumstances. Developing such a strong enforcement policy goes a long way toward establishing deterrence of violations and encouraging voluntary compliance. SBLC feels strongly that this Congressional Committee should exercise its oversight responsibilities in assuring FTC maintains its historical perspective of antitrust enforcement.

SBLC does favor the approach the Federal Trade Commission has taken in recent years with respect to rulemaking. It now appears that it is acting in a sensible and rational basis in eliminating deceptive practices and yet not destroying small business concerns in the process. In the past, too much emphasis has been placed on remedies that impose a heavy burden on small business concerns. However, SBLC has recently expressed its strong concern over recent proposals by the Federal Trade Commission to revise the guidelines on advertising and promotional allowances. Many of these proposed changes, such as a subjective "value to the seller" standard, would be of severe detriment to small business. The Robinson-Patman Act was passed to prevent many of the discriminatory acts the proposals would condone. SBLC does not believe they are within the intent of the Act or of Congress. We would strongly urge this Committee to carefully study and review those proposals. A copy of SBLC's comments filed with the Commission is attached.

Similarly, in recent years the Bureau of Competition had been stressing and placing greater emphasis on horizontal arrangements that deprive small business concerns of the opportunity to compete. We would, however, caution the Commission to move slowly in challenging arrangements by small business concerns that band together to engage in group buying or jointly market goods. Only through joint efforts can small competitors compete with large rivals such as mass merchandisers.

It will be no surprise to this Committee to be advised that the 1936 Robinson-Patman Act designed to eliminate price discrimination, is of paramount importance to small business concerns. This statute that was enacted after an investigation by the Federal Trade Commission in 1936 of the rise and expansion of chain stores is designed to ensure that all competitors compete on an equal footing. Small merchants that must pay higher prices for the same goods as those purchased by their larger rivals suffer a heartbreaking disadvantage in competing for sales to customers. Similarly, when large national corporations engage in predatory pricing with the intent of eliminating smaller and regional competitors, they pose a direct threat to small business.

In the past, we have met with the chairmen of the Commission and expressed our concerns regarding enforcement activities, and we believe the interest of Congress, through oversight hearings, ensures that the Commission will respond to the need to conduct investigations. We believe the FTC should continue to investigate predatory pricing on an industry by industry basis. We would hope that the Commission would continue its focus in this area and pursue additional investigations looking into pricing problems causing injury to independent business. We cannot over emphasize the importance of a strong and healthy Robinson-Patman Act to small business.

SBLC would specifically cite the reporting requirements imposed upon the Commission by House Joint Resolution 738 detailing FTC enforcement activities regarding predatory pricing in fiscal year 1987. In response to this legislation the Commission submitted a summary of individual predatory pricing complaints received, an evaluation of their merits, and the status of FTC review. While procedures such as this do not guarantee adequate final enforcement, they do greatly assist ongoing evaluation of the Commission's efforts in this area. SBLC regards such legal reporting requirements as important progress and strongly supports their re-enactment and expansion by the Congress. To that end, SBLC endorses enactment in this committee's FTC reauthorization legislation of continued FTC reports to Congress for fiscal years 1990, 1991, and 1992, as was done by this Committee last year and as passed by the Senate last year in S.677.

Small business continues to suffer the consequences of what we call the tort reform/insurance regulation crisis. At the 1986 White House Conference on Small Business, the number one recommendation was a comprehensive statement on the tort reform/liability insurance crisis. The recommendation acknowledged the fact that the crisis is a multifaceted problem requiring action in several different areas. The three major components of a comprehensive solution are reform of the civil justice system, enactment of a federal product liability bill and closer scrutiny of insurance industry regulation. In 1986, much of the federal activity was focused on tort reform and product liability. A number of States enacted significant civil justice reforms and a national product liability bill made it to the floor of the Senate. Insurance regulation was placed on the back burner. In 1987 and 1988, greater attention was paid to the subject of insurance regulation.

The foundation for the policy position of the White House Conference recommendation was the desire of small business to achieve one goal -- to ensure the availability of affordable insurance. It is fair to say that it is not so much how we achieve this goal, but that we do, indeed, achieve it. The White House Conference recommendation acknowledges it will take action in each of the major policy areas to insure a lasting, stable insurance environment.

Congress, in 1980, amended the FTC's authorization forbidding the FTC to investigate or even study the entire insurance industry in any areas related to the McCarran-Ferguson Act exemption. The law does provide that the FTC can study or investigate if either the Senate or House committee of jurisdiction over the FTC specifically requests the FTC to do so.

Because of the adverse consequences the insurance crisis has imposed upon small business, SBLC supports repeal of the McCarran-Ferguson Act.

Finally, as in the past, we recommend a line item for Robinson-Patman enforcement be included in the FTC appropriations. In that manner we can be assured that this important statute will receive appropriate attention.

Mr. Chairman, we appreciate your Subcommittee's interest in the policies and programs followed by the Federal Trade Commission. We believe that it is a very healthy and rewarding exercise for this subcommittee to conduct its oversight of the Federal Trade Commission and the work that it is doing in the marketplace to stem abusive practices and unfair methods of competition. If authorization is granted to the Federal Trade Commission, as we have recommended, you will certainly be able to continue your worthy efforts to continue reviewing FTC policies. We wish to commend you for your efforts and thank you for the opportunity to appear here today.

Senator BRYAN. Thank you, Mr. Satagaj. Mr. Berrington.

STATEMENT BY CRAIG BERRINGTON, GENERAL COUNSEL, AMERICAN INSURANCE ASSOCIATION

Mr. BERRINGTON. Thank you, Mr. Chairman. I know it is late and I will try not to take a lot of time.

Senator BRYAN. You are not penalized in any way by being last. You take whatever time you need within the five minutes.

Mr. BERRINGTON. We appreciate very much the opportunity to be here today. I want to talk, specifically, about Section 14 of the FTC authorization legislation from the last Congress.

Section 14(a)(2) would have instructed the FTC to conduct various studies of the property and casualty insurance industry with regard to insurance rates for specific types of commercial liability insurance.

We opposed that legislation at that time and we oppose it now. There are five basic points I would like to make today.

The first is that the market circumstances upon which Section 14 were premised have changed, with recent data indicating that prices are decreasing and availability increasing for virtually all of the lines of insurance that were identified for investigation.

The second is that the insurance industry exemption from FTC jurisdiction is not unique, but it is similar to other regulated industries, also exempted from the FTC.

Third, the insurance industry exemption does differ from other regulated industry exemptions in one important respect. The exemption for the business of insurance is conditioned on the existence of regulation elsewhere in the states. The other regulated industry exemptions assume regulation elsewhere, but the insurance exemption requires regulation elsewhere.

Fourth, the insurance industry is highly competitive under any legitimate, empirical calculation of competitiveness.

And fifth, as a matter of public policy, I think it is questionable whether the FTC, or any government agency, should have standing authority to conduct investigations in an area where it does not also have enforcement authority.

Let me take just a few minutes to discuss in a little bit more detail a couple of those points.

First, what is the status of the market for lines of insurance that would have been covered by the Section 14 study?

The answer, according to most observers and the trade press, which looks at these things carefully, is that prices have been going down and availability up. This was recently confirmed by a 1989 report by the Risk and Insurance Management Society. These are not insurance people. These are corporate executives who have the responsibility for obtaining insurance coverage for their companies.

That 1989 study found that availability and coverage conditions continued to improve.

For primary general liability and professional liability umbrella, excess liability, directors and officers liability, they found no areas where it was getting more difficult to obtain or afford.

Moreover, in an area that was of substantial concern and still is, in many ways, the availability and cost of medical malpractice insurance—the line most suffering from escalating rates and disappearing availability—there has, in fact, even in that area, been a moderating of prices. We have a long way to go, but a moderating of prices with the largest insurer having a rate reduction in 32 states.

While none of us should risk predictions for the future, I think it is fair to say that extreme changes in the economy and unpredictable changes in judicial doctrine, were the main culprits of the liability crisis, which resulted in the wild swings in liability rates.

If we control these factors, the insurance cycle itself, I think, is more amenable to control.

The second point I would like to address in just a little bit more detail relates to the treatment of the insurance industry under the FTC Act—and whether that treatment is unique and unjustified. The answer to both of those questions is, in my judgment, no.

Insurance is not unique in being exempt from FTC jurisdiction. Other industries expressly exempt include banks, savings and loans, federal credit unions, common carriers, domestic and foreign air carriers, packers and stockyards.

The key unifying element is that in each of these cases, these industries are exempt from the FTC Act, because of an expectation of regulatory direction and control elsewhere.

And, indeed, for insurance it is more than an expectation. Under the McCarran-Ferguson Act, the exemption only exists—for the FTC Act or for the Sherman Act or the other antitrust laws—to the extent that in any particular state there is regulation of the business of insurance. Therefore, there is no loophole with regard to insurance activities being regulated.

Moreover, I think it is critical to note that in every state there is an analog to the Federal Trade Commission Act, set up and enacted, specifically, to deal with insurance. There is no unfair practice which the FTC Act would cover that would not also be covered by the equivalent acts in the various states.

Finally, with regard to the FTC's investigatory authority, it would seem to us that the investigatory authority that was proposed in Section 14 was really nothing more than an effort to gain for the FTC a foothold on turf to which it has no proper claim, because the insurance industry has been investigated plenty in the states and regulated in the states.

Section 14 merely revived the question, settled originally in 1945 by enactment of McCarron-Ferguson and settled the second time in 1980, of whether the FTC should have investigative powers over the industry. In both 1945 and 1980, it was determined that the FTC has no enforcement authority with regard to insurance, when insurance is regulated in a state. And, therefore, the FTC should have no independent investigative authority. To provide the FTC with some auxiliary enforcement activity, however, the Congress made clear in 1980 that if either your committee or your equivalent committee in the House believed that there was a problem important enough that the FTC ought to investigate it with regard to insurance, that either committee could direct the FTC to do so.

That, in my judgment, ought to be enough to legitimately address any problems that remain, and at the same time, properly retain the focus of insurance regulation in the states.

Thank you very much.

Senator BRYAN. Thank you very much, Mr. Berrington. Let me ask just a couple of questions, and then I will let you off easy today.

I think even a casual observer would have to note, or acknowledge that there is a real public discontent with insurance, generally, not casting any aspersions on any particular company, but just generally.

Proposition 103 is perhaps the most dramatic and publicized example of that.

But in the various state legislatures that are meeting throughout the country this year, mine in Nevada included, insurance legislation is on the front burner.

My question to you would be, what role, if any, does the federal government have in addressing those concerns?

Mr. BERRINGTON. Well, that is a very good question, Mr. Chairman. And I should say that those of us who have lived through the Proposition 103 wars in California, have had our faith in state regulation tested to the utmost. But, even with that, we support the current structure.

I think that the proper role at the federal level is to continue to be aware of problems and to monitor developments. But it is important to understand that these issues do get resolved and handled in the states.

The issues in the states today relate, primarily, to auto insurance. In California that was the genesis of Proposition 103, as well as similar efforts in Arizona and in other states.

At the same time the problems of several years ago relating to the commercial market really have been resolved. And I think that there is a real chance—a better chance—of resolving these issues in the states than there is at the federal level. We may, in fact, get very good legislation in California, providing no-fault automobile insurance, which will bring down rates for everyone.

And so I think the role for the federal government and for the Congress is, obviously, to stay alert and listen to their constituency, and if there is a major problem, the language that was in the 1980 FTC authorization bill, which would allow you to direct FTC studies, should, I think be utilized.

Senator **Bryan**. Mr. Berrington, I must say that I was struck somewhat with a paradox, having a background at the state level in which the following argument has been addressed to us, historically, from the days that I was a member of the state legislature: we would prefer to have you all at the state legislature do that, rather than to have the Congress or a federal agency.

That seems to be your position today, essentially, and yet I wonder if five, six, or seven years from now, if the states get as aggressive as California, and others appear to be doing, will you or your successor be here and argue as did the last panel, with the exception of Mr. Silverglade, that we need stronger action at the federal level, and to try to, in effect, restrain the state efforts in terms of deceptive and unfair advertising?

That paradox has struck me, and Mr. Satagaj, you speak on behalf of small business. Every state, my state as well, have them. And, historically, those people have made the same kind of pitch that Mr. Berrington and others have made, and I say this with the greatest respect, please, let us keep the federal government out of this arena.

You seem to be saying, if I understand your position today, that you favor an aggressive FTC that sets the rules of the game so that everybody knows how the game is to be played. I sensed in your testimony that you think, in some respects, that the FTC needs today to be more aggressive. Would that be a fair characterization?

Mr. **Satagaj**. It is interesting you make that analogy about the federal regulation, because that is, in fact, testimony before this subcommittee and previous Congress's the exact point I have made; you say, federal regulation, and immediately small business owners shudder and go, "Oh my God, I cannot handle the situation."

But the truth of the matter is that here is another side to balance it. We look at the global nature of the insurance industry. Never mind national. The global nature of it.

And we say, can the states handle the information side of it? I am not even talking about the regulatory side of it, but the informational side of it. How can we deal on a state-by-state level. Maybe California can, and maybe New York can, but can Nevada? And that is the question.

That is what we are struggling with—the balance betweem federal regulation, but dealing with the same level of resources with an industry that is global in nature.

In that sense, we are saying, "Yes, be more aggressive." From the regulatory sense, "Gosh, we do not really like it." We would throw in, maybe, that you have to look at the McCarron-Ferguson Act, and look for revision there instead of federal regulation.

Senator **Bryan**. Well, it is increasingly clear to me that there really is not a monolythic "industry" point of view in terms of federal versus state regulation, and that is the point that I was trying to make.

I appreciate your testimony, Mr. Berrington. You look like you have got something that we need to hear. Let me pass the ball to you one more time before we recess.

Mr. **Berrington**. I appreciate that very much. The question of whether there ought to be federal regulation as opposed to state regulation of insurance is an important issue. But I think the primary question today is not quite that.

It is whether in a system in which regulation is currently at the state level for insurance, including unfair trade practice regulation, whether in that situation there ought to be overlapping, duplicating and, perhaps, inconsistent regulation at the FTC level.

Senator **Bryan**. I think I understand the point that both of you made, and I appreciate your testimony. And we will have some additional follow-up questions.

[The following information was subsequently received for the record:]

have independent authority to study some aspects of insurance? If so, what are those aspects in which the FTC has a role?

RESPONSE: In fact, the 1980 amendment to the FTC authorization expanded the FTC's authority to investigate certain areas of insurance upon request from a majority of either the Senate or House commerce committee. Before this expansion of authority, the FTC had no authority to investigate the business of insurance without approval of two houses of Congress and the President. The reason for this provision dates back to the late 1970s when the FTC sought unilaterally to extend its jurisdiction over the insurance industry. At that time the Commission had initiated more than 30 separate insurance industry investigations at a cost of millions of dollars and was attempting to commence Trade Regulation Rule proceedings in areas that would have duplicated efforts already undertaken by the states.

The Congress subsequently determined that, in view of the statutory limitations on FTC jurisdiction over insurance, the Commission had clearly overstepped its authority. In an effort to prevent future adventurism of this type the prohibition on insurance studies was added to Section 6 of the 1980 re-authorization.

The Section 6 amendment did not eliminate any FTC jurisdiction over insurance. Where activities of insurers do not meet the McCarran Act requirements, the FTC is under no restraint. The Section 6 language merely provides that where the Commission has no insurance jurisdiction it may not investigate except by Congressional request. Since 1980 the Commission has conducted a number of insurance-related investigations, at least four by Congressional request and several more by virtue of the activities being classified as outside the scope of the McCarran Act immunity and thus within the Commission's jurisdiction. It is only in matters outside the scope of the McCarran Act immunity that the FTC has any authority to investigate an insurance activity without a request from a majority of either of the two commerce committees.

Thank you again for an opportunity to comment on the role of the FTC with regard to the business of insurance. Please do not hesitate to contact me for information on any insurance matter of concern to you or the committee.

Sincerely,

Craig

CRAIG A. BERRINGTON
General Counsel

Senator **Bryan**. This subcommittee will stand in recess until tomorrow at 9:30 a.m.

Wherefore, the hearing was adjourned at 12:40 p.m.

FTC REAUTHORIZATION

THURSDAY, JUNE 8, 1989

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:30 a.m. in room 253 of the Russell Senate Office Building, Hon. Richard Bryan (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR BRYAN

Senator BRYAN. The Subcommittee will come to order. I extend a warm welcome to each of you here today who is participating in the hearing.

Some of you who were here yesterday know that the focus of our hearing involved testimony from the Federal Trade Commission, members of the Kirkpatrick Committee that has just completed and reviewed the activities of the FTC, advertisers, public interest groups, small business and insurers.

Today, we will hear from the state attorneys general, consumer representatives, the Chamber of Commerce and other groups with an interest in particular issues before the FTC. I might say on a personal note that I am delighted to welcome as our first witness this morning an old friend of mine, the Attorney General of the Empire State, the Chairman of the National Association of Attorneys General and part of that distinguished group of attorneys general were elected in 1978.

General Abrams, we are delighted to have you here and we look forward to hearing your testimony.

STATEMENT OF ROBERT ABRAMS, ATTORNEY GENERAL, STATE OF NEW YORK; ACCOMPANIED BY MEL GOLDBERG AND LLOYD CONSTANTIN

Mr. ABRAMS. Thank you, Senator Bryan. I have a personal high privilege, not only for myself but all of our colleagues, to appear before you this morning and to appear before this Committee, which has as its ranking minority member Senator Slade Gorton.

Obviously you, Senator Bryan and Senator Gorton being former attorneys general and alumni of our organization, rising to the very important position of Member of the United States Senate, it is not only a great thing for the people of your state and this nation, but it is something we feel a very special sense of pride about.

So we are delighted, at this early opportunity of your tenure and the key position that your colleagues have given you, to consider this important matter and I am sure during your term, many important issues that affect the public interest as it relates to consumer matters.

Let me at the outset indicate who is seated to my right and left. Lloyd Constantin, to my right, is the Assistant Attorney General in charge of the Antitrust Bureau in New York State and he has not only served the people of our state well but has been very active with the National Association of Attorneys General and his colleagues in the other sovereign states over recent years, when there has been the emergence of state enforcement activity in the antitrust area.

To my left is Assistant Attorney General Mel Goldberg, who serves with distinction in the Consumer Fraud and Protection Bureau, where there has been considerable activity by New York State and other states in the area of false advertising.

Senator Bryan, I truly appreciate the opportunity to come before you and your colleagues today to present this testimony. I am currently serving as President of the National Association of Attorneys General, although except where our association has taken a formal position in the form of a resolution, the views that I express before you this morning are my own.

The protection of consumers from fraud and deception in the marketplace and the protection of our free enterprise system from anticompetitive activity are essential responsibilities of both state and Federal governments. It is part of the genius of our market system that it has a self-correcting tendency through which excessive prices, defective products and conspiratorial behavior can be controlled by free and open competition.

However, 75 years ago, when Congress created the Federal Trade Commission, it was well aware that such self-correction can be intolerably slow and that government intervention is often essential to protect today's consumers from fraud, deception and anticompetitive behavior.

That is no less true today, in 1989, and I view it as scandalous that as our economy and our marketplace have become more complex the resources of the Federal Trade Commission have been slashed virtually to half the level that it was ten years ago.

I support not only the reauthorization of the Federal Trade Commission, which has been limping along under one-year extensions since 1982, but also a substantial strengthening of the Commission's resources and mandate.

I hope this Administration will embark upon a long-term project to beef up the FTC's staff and I hope that Congress will repeal such restraints as exist on the FTC's power to investigate the insurance industry. I also hope Congress will not succumb to the blandishments of other industries seeking special exemptions or privileges.

Federal agencies and Federal resources will never be adequate to meet the entire task of disciplining our marketplace. There is and will remain an essential role for state enforcement. As I will explain more fully later, in order to reduce conflict, minimize overlap and maximize our effectiveness, Federal and state authorities must work much more closely and cooperatively to pursue our common mission.

It might be helpful to briefly examine the recent emergence of state attorneys general as a major force in consumer protection and antitrust enforcement in the national arena.

The list of actions brought by state attorneys general is indeed striking and significant: a 19-state antitrust suit alleging an international conspiracy of insurance and reinsurance companies; crackdowns on deceptive advertising by airlines and car rental firms; major cases to stop mergers in the airlines, supermarket and department store industries; joint projects to eliminate bogus health claims on food products, and national vertical price-fixing cases in the consumer electronics and camera industries. And there are others.

In large part, such initiatives were taken because Federal agencies were no longer addressing these types of problems. In doing so, the states have made an effective case for a return to more aggressive enforcement at the Federal level.

We have also demonstrated that enforcement by the states and in the national arena is a positive development. The dire predictions that increased state activity would lead to balkanization and hamper the efficiency of national firms were wrong.

Indeed, through the mechanism of the National Association of Attorneys General we have developed a broad consensus and a coordinated enforcement strategy in the key areas of consumer protection and antitrust enforcement. Our crackdowns on deceptive advertising by airlines and car rental companies were implemented through the adoption by NAAG of guidelines of enforcement policy which our members agreed to apply evenly and uniformly in implementing their various state statutes.

Similarly, NAAG adopted guidelines for antitrust enforcement against anticompetitive mergers and vertical trade restraints. Our Minolta settlement was joined by 37 states, the Panasonic settlement by all 49 eligible states. The balkanization argument is a canard.

Moreover, the record will show that our activity has not inhibited the efficiency of our corporate sector. The recent squawks from the advertising industry can be dismissed as yet another example of an industry which says, "If we are going to be regulated, we do not want to be regulated very well. We would rather have a different regulator who sees things our way."

We also must remember in this year, which marks the Bicentennial of our Constitution, that state enforcement activity has long and honorable legal and philosophical bases, which have nothing to do with the often rancorous debate of the 1980s.

Our great charter of federalism prescribes a system which enlists both the Federal and state governments in fulfilling the commands of the people and it creates a system of checks and balances, not only among the branches of the Federal Government but also between the Federal Government and the states.

I think our challenge for the 1990s in the areas of consumer protection and antitrust enforcement is to emphasize the cooperative aspects of our Federal system. Toward that end, I would suggest a national strategy of cooperation that will utilize the recently acquired sophistication and muscle of the states in partnership with the resources of the Federal Government.

In particular, I believe that the Federal Trade Commission should be more willing to share their experts, economists and other investigative resources to assist states in the development of cases. The FTC should assist us in data gathering and in pursuing corporations or individuals whose activities cross state lines. They should be more willing to engage in joint investigations and projects such as the telemarketing initiative which has been underway since January 1987.

Clearly, it would be appropriate for the Federal enforcers—and I am not speaking only of the FTC—to stop their efforts to undermine, oppose or preempt state activity. Just two weeks ago, for example, the FTC proposed rulemaking to partially preempt state lemon laws, which are important to protect buyers of defective automobiles.

Perhaps most importantly, I hope the FTC will return to more vigorous enforcement in its traditional areas of responsibility, with a particular focus on problems of a national scope. A reinvigorated FTC committed to working closely with the states could, in my judgment, lead to a coordinated enforcement strategy under which the primary responsibility for enforcing various areas of antitrust and consumer protection law could reside with the agency and level of government best suited and predisposed to enforce them.

In the area of merger enforcement, for example, states attorneys general have in recent years demonstrated an ability to effectively handle merger enforcement against national firms. Although this work can and should continue, I have proposed that primary, though not exclusive responsibility for enforcing Clayton Act Section 7 against anticompetitive mergers of large national firms that do business in many states in more than one region of the country should reside with the Federal Government. The states under this scheme would be primarily responsible for mergers involving firms that do most of their business in a single state or the region of the country in which that state is located.

In the consumer protection arena, as a practical matter, if the FTC were vigorously policing national advertising campaigns and fully protecting citizens of our states, we would no doubt see attorneys general pouring more of their resources into problems of a regional and local nature. However, groups of states on a coordinated basis can and will continue to bring national advertising cases in appropriate circumstances.

I recommend to this Committee not only the reauthorization, but also the reinvigoration of the Federal Trade Commission.

Senator BRYAN. General, thank you very much for your testimony. Your testimony anticipates at least a couple of questions that I have.

Yesterday, there was a good bit of discussion about the difficulty of in effect establishing a national advertising standard if each of the respective states of the attorneys general begin processes in which, either through administrative ruling or court decision, different standards are established with respect to that advertising.

So the argument was made to us, as you might well anticipate, that the attorneys general ought to in effect recede or back off on some of these areas. Can you respond and amplify your comments just a little bit? You touched upon that in your testimony, but that is an area that I think the Subcommittee would like to have part of your response on the record.

Mr. **Abrams**. Yes. First of all, I think if one examines what has happened in the recent period when the Federal Government has retreated, and of course it is clearly our view and our hope that the Federal Government will return to its key responsibility in bringing these investigations and instituting these investigations and bringing these cases in that period, the states have worked in an incredibly coordinated way.

I think it is a canard, as I said in my formal statement, to raise the specter of balkanization because perhaps in an unprecedented atmosphere of cooperation the sovereign states have seen an obligation on the part of state governments to step in and enforce their own state laws when the rights of their citizens are being aggrieved as a result of violators of those laws, for example, in the area of advertising as well as in the area of antitrust.

Those states have decided that they would seek to eliminate any possibility of balkanization by gathering together and developing guidelines and they have done that in several areas and these guidelines are a statement of enforcement policy of the states.

It grants no additional or new authority to those states. Those states always had that authority under existing law and under the Constitutional framework of federalism that has been operating since this nation has been created. The states indeed have the legal authority, responsibility and appropriate role in enforcing laws as it relates to the welfare of their citizens.

So there has been this incredible opportunity for cooperation and I would like to submit for the record a copy of the kinds of guidelines that have developed the broadest possible consensus.

For example, in the area of vertical restraint activity, guidelines were adopted by the states without any dissent at the meeting that it was taken up. The merger guidelines were adopted with a single dissenter. The airline guidelines were adopted only with two states dissenting.

The car rental guidelines were adopted in a similar fashion, with near unanimous support. The pre-merger disclosure compact that was entered into, a voluntary effort on the part of the states to enforce antitrust merger statutes, was entered into by 45 separate states.

A good example of the kind of coordination that could take place was the Panasonic case that originated a few months ago. It started with New York and Maryland and created a framework for all the states to opt into and in a single case, 49 of the eligible states opted into that settlement that brought relief for some 660,000 consumers all across the country.

So I think it is inaccurate, not only unfair but inaccurate, to draw the specter of balkanization when the states have done an outstanding job in coming together and in fact it has been noted by scholars.

It is—the recent February edition of the Harvard Law Review had a leading article by the head of Harvard's Law Review for this year, an article that indicates—that is entitled, "To Form a More

Perfect Union, Federalism and Informal Interstate Cooperation" and it tracked this extraordinary degree of cooperation that has emerged from the states.

It indicates its consistency with the broad outlines of federalism in the country and the kind of important work that has been done in the public interest.

Senator **Bryan**. General, there are many questions I have but in the interest of allowing others to appear before the Subcommittee in a timely fashion, let me just ask you one other question.

Your testimony did make reference to the initiative by the attorneys general insofar as telemarketing is concerned and I would like for you maybe to sketch, if you will, the role that you have undertaken and where you feel, if at all there is a need for Federal legislation and just in general the parameters of that Federal legislation.

Mr. **Abrams**. With respect to telemarketing?

Senator **Bryan**. With respect to telemarketing.

Mr. **Abrams**. Well, I know there is Federal legislation that is pending. The Luken-Gore bill deals with an opportunity to have more creative opportunities for enforcement in telemarketing and I think there is other legislation that is pending as well that would give an opportunity for the states to participate in the enforcement of telemarketing.

I think as it relates to telemarketing it is another good example of the kind of cooperation that I would like to see continue and even blossom further. There has been a working group in recent years established of the Federal Trade Commission, the Commissioners of the Federal Trade Commission as well as five members of the National Association of Attorneys General and they meet to share information, coordinate, and have used telemarketing as an area for joint information sharing and for an opportunity for more effective enforcement.

I see that as—by the way—that kind of cooperation as a harbinger for things to come, perhaps in the antitrust division. I have requested Attorney General Thornburgh to consider the establishment of a cooperative arrangement like that in the antitrust area as well with the chief of the antitrust division meeting with a group of state attorneys general.

It has worked incredibly effectively in the area of criminal enforcement with the Attorney General of the United States, assistant, or the United States attorneys, district attorneys and state attorneys general and so I think there can be a tremendous amount of coordination and cooperation by targeting our resources and in the area of telemarketing, where there is a tremendous amount of fraud, New York has been particularly active in recent years in cracking down against boiler rooms and in dealing with other kinds of fraud.

Now, with the emergence of cable television and that kind of marketing done over the airwaves I think this becomes one of many key areas of enforcement potential for the Federal Government and the states.

Senator **Bryan**. That is a major problem in Nevada. Perhaps, General, if you could have a member of your staff either in New York or part of the NAAG staff, maybe, give us something in terms of defining with a little more specificity than you can do right now, because that is an area that I am personally interested in since we have had a similar problem in the State of Nevada.

We have been joined by the ranking member of this Subcommittee, who himself is a former President of the National Association of Attorneys General, Senator Gorton.

Senator **Gorton**. Mr. Chairman, why do you not go on with your questioning. I was very interested in that last comment. Why do you not go ahead?

Senator **Bryan**. Let me ask one other question if I might. As you know there has been a dialogue that in my view has not been the most constructive on behalf of some members of the Federal Trade Commission characterizing all of you as counterrevolutionaries. This is the first time in my life that I have actually met one and I can tell folks that I have actually known one.

Describe if you will in a more positive sense, how you feel that the attorneys general can work with the Federal Trade Commission? As you know, some have suggested that there may even be a memorandum of understanding that could be entered into. Is that a practical approach and do you feel that you have got at least the ability to enter into some constructive discussions with them in terms of allocating the resources, a comment that you made earlier?

I am sure that your resources in New York State are finite, in terms of what your office is capable of doing. I am sure that every attorney general in America would say the same thing and you are very mindful of the situation we have at the Federal level in terms of our own deficit problem. So, there is not as much money as may be needed in a perfect world to address some of these problems that we have discussed.

How do we maximize the resources that are available to avoid duplication, to establish some priorities in terms of allocating those resources and to do so in a constructive way to benefit ultimately the public, which is your charge and responsibility as well as our own as Members of the Congress, as well as the Federal Trade Commission?

Mr. **Abrams**. I think it is imperative, senator, to do that today more than ever. We have one half of the resources at work for the public interest today at the Federal Trade Commission that we had ten years ago. There is only 53 percent of the level of person years of commitment to work for the people of this nation at the Federal Trade Commission level today, and yet today as contrasted to ten years ago we have a much more sophisticated economy and we have seen increased concentration in certain industries, particularly the airlines.

I was a little late here today—problems over at the airlines—and I think all of us have our war stories about airlines and we know what has happened in recent years. While deregulation was taking place we had a lack of vigor of antitrust enforcement as it related to merger and so the major—five or six major companies now have a greater concentration of the market than they did before deregulation

Of course, now we cannot regulate pricing and so prices have gone up considerably on most routes in this country and we have had considerable problems about linkage between rural parts of our states and our nation and it is much more difficult to get from one place to another.

So I think the opportunity for coordination and sharing is very important, and maybe I can amplify a little bit in that what has happened in a practical way and in other contexts, because it seemed to trigger interest on the part of your colleague Senator Gorton.

So this is not theoretical. Notions and ideas—the notion of sharing resources, cross-deputization, working together. That executive working group in the criminal justice system has been powerfully effective and it happened in the Reagan administration, and great credit goes to that Administration for being committed to not only articulating in language and in words the concept, but for really working at it and implementing it, the Attorney General of the United States meeting with the district attorneys, representatives of the DAs, the United States attorneys and state attorneys general.

So that in my own office we have had numerous examples of effective cooperation through that kind of linkage. So that an assistant attorney general in a major tax case in New York, we were finding that there was a hemorrhage of $200 million a year from the treasury of the state and the Federal Government was losing millions of dollars because there was a scam of people bringing in petroleum products without paying their proper sales and excise taxes.

So the FBI and the New York City Police and the state police and the district attorneys and the United States attorney and the attorney general formed a task force. We worked well together. We share information, shared resources and an assistant attorney general was deputized as a special assistant to the United States Attorney and tried a major case in the Federal court and got convictions and got a verdict.

So we can be doing that. We have been doing that in other areas, where in consumer protection it is so vital as a pocketbook issue to the average citizen, to the average American and we have seen an almost 50 percent cut in resources with an increase in the problems that are confronting the nation.

It is very important that we have that kind of experience practically be implemented in the next few years and it is my hope that a period of rancor will end, that we will have a new head of the Federal Trade Commission and new Commissioners coming on stream which gives it new opportunity and new atmosphere for working out this arrangement.

Hopefully a similar kind of working group can be established over at the Department of Justice with the head of the antitrust division, as I discussed with Attorney General Thornburgh. I think that is a way in which we can truly maximize our resources in a common interest of enforcing the law and serving the public.

Senator **Bryan**. General, thank you very much.

Let me now yield to Senator Gorton.

Senator **Gorton**. I want to follow up on exactly that subject.

How would you envisage that kind of cooperation taking place? Would it take place between the Federal Trade Commission and/or the Department of Justice and the New York Attorney General's office for particular cases in New York?

Is there any way that NAAG, for example, could be an equal partner in reaching some kind of agreement on antitrust jurisdiction? And how could that be implemented or enforced on 50 or more separate attorneys general? I asked this question yesterday of the FTC.

NAAG is a wonderful organization. But obviously you do not have any kind of control authority over other members. If we are to have this working-together, primary divisions of responsibility, even cross-deputization, what kind of structure is it going to take to do that?

Mr. **Abrams**. Senator, before you came in I commented on a couple of points that feed into that. First of all, the extraordinary degree of cooperation that has existed in recent years. And I will make available to you copies of guidelines that have been adopted by the sovereign states in terms of enforcement policy, in terms of vertical restraints in the antitrust area, merger in the antitrust area, the important issue of airline advertising and car rental advertising, and a unique compact of 45 states to minimize the potential for Balkanization.

And, indeed, as Paramount in the last 24 hours announces its proposed takeover of Time, they have come forward under our compact and filed all Hart-Scott-Rodino pre-merger disclosure information.

Senator **Gorton**. Who is the "they"?

Mr. **Abrams**. The representatives of Paramount, the lawyers for Paramount in that takeover situation.

And so the states have been working in a very close and cooperative way. We want to now translate that into close working relationships with the Federal Government as well.

Senator **Gorton**. So you believe that NAAG as an entity could do that, and that, for all practical purposes, all of the members of NAAG would go along with those decisions?

Mr. **Abrams**. First of all, we have done that. There has been a working group established for the Federal Trade Commission and the attorneys general. Each member of the Federal Trade Commission, the five, including the Chair, meet with five designated NAAG members, five elected state attorneys general in a working group. They meet three times a year, and they have an agenda before them. What are the major cases; what is of interest to you; what is of interest to us; what is going on; can we help each other; can there be a joint project, telemarketing project, feeding into a computer basic information that the Federal Government has, and cooperative states are feeding into that.

I told Senator Bryan that I think that is only in the embryonic stage. I think there is far more potential in terms of sharing with the resources that I had talked about in my testimony, trying to get an economist in a given case that is very important to a given state or a region, to be loaned out and to be working with a state or a group of states who are bringing actions together. We have seen that.

And maybe, Lloyd, you might want to amplify the kind of thing that you have seen in your experience, either in antitrust or mail, in terms of consumer protection.

Mr. Constantin. Senator Gorton, you know, John Ellis, who used to work for you, was the head of a group of all of the heads of the state antitrust offices in the United States, and I had the privilege of serving as the head of that group for four years as well. That group functions as a coordinator for all of the activity of the state AGs around the country in antitrust enforcement. It is the Antitrust Task Force of the National Association of Attorneys General. We also have an Antitrust Committee.

Right now we are presented with complaints from businesses around the country, requests for our intervention for amicus coordination, for amicus curae briefs, and we do that. It would be a very simple step for that group or for a representative of that group to sit down with the head of the Antitrust Division, which is probably Jim Rill, and the new head of the Federal Trade Commission and work out a liaison agreement whereby we coordinate our enforcement, where certain cases are assigned to specific agencies. And this is not coercive on the part of the states. No AG has to participate. They participate because they find it in the interest of the citizens of their states.

Ken Eikenberry, your attorney general, has been very active. He always asserts the sovereignty of the state, the ability of the state to opt out whenever they deem it appropriate. But, in fact, he has opted in each and every time, because it has been in the interest of the people of the State of Washington.

And we do this right now. It would be just one small step to take it to the level of coordination among the three enforcement agencies on the antitrust side; and I think a similar arrangement can work in consumer as well.

Senator Gorton. Bob, you✓~~are dea~~ling in this connection with both the Department of Justice and with the Federal Trade Commission. Do you have any observation as to whether or not it is easier to get a decision out of and to cooperate with an agency like the Office of the Attorney General with a single head than it is with a commission with five members?

Is there any possibility that we would be better off with, instead of a Federal Trade Commission, a Federal Trade Commission agency or something like that with a single head? What are the advantages and disadvantages of those two different systems?

Mr. Abrams. Well, I did not think I was coming here today prepared to talk about a major revision of the Federal Trade Commission. I would be satisfied for the moment if we got a formal reauthorization, we got a new head designated. Getting that person quickly confirmed by the Senate, getting adequate appropriations there, getting new membership, and new blood, and life breathed into it, and having some message come from the Congress that we want the Federal Trade Commission in its 75th year to remember what the mission was supposed to be at the beginning and some of its more glorious days of what it has accomplished, and move on and do the job. I think if we get further bogged down in terms of overall possible reform, we are going to lose a lot of ground.

Senator GORTON. I do not think that is going to happen. I just wanted your views.

Mr. ABRAMS. Well, I think if we had a Federal Trade Commission with the kind of people that I would like to see there, I think it can do an excellent job for the public interest; and I think that has been demonstrated during various periods of its 75 years of life.

Senator GORTON. Thank you.

Thank you, Mr. Chairman.

Senator BRYAN. Thank you, Senator Gorton. Our time has expired.

Bob, we appreciate your being here today and bringing two of your colleagues, Mr. Constantin and Mr. Goldberg. And we will be processing this piece of legislation and welcome your input, and would ask you to respond to any additional questions that our colleagues, who serve on the subcommittee, but who are unable to join us this morning, may have.

Thank you again.

Our first panel this morning will consist of Mr. Mark Silbergeld, Director, Washington Office, Consumers Union; Ms. Katherine McDermott from the law firm of Collier, Shannon, Rill and Scott, representing the United States Chamber of Commerce; and Dr. R. Malcolm Overbey, President-elect of the American Dental Association.

I would ask each of the panelists, if you would, to summarize your comments. Your formal written statements are made a part of the record. If you would, try to limit yourself to five minutes. We will begin with Mr. Silbergeld, unless you have all agreed upon a different order.

STATEMENT OF MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION

Mr. SILBERGELD. Thank you, Mr. Chairman. It is my privilege to accept your invitation to be here this morning, not only on behalf of Consumers Union, but also on behalf of the Consumer Federation, the National Consumers League, Public Citizen, and the U.S. Public Interest Research Group. So, what I have to say is joined in by all five of the national broad-issue consumer organizations.

I was just going to summarize my testimony and wait for the rest of the panelists to complete so I could take some questions, but I think after hearing General Abrams, I ought to retract some of my testimony and thank the FTC for not doing its job over the last few years, because it obviously has spurred a terrific increase in the activities of states on issues of national importance. But I will forego that, because I think we all strongly believe that the Federal Trade Commission needs to do its job no matter what the states are doing that is important to helping consumers.

We do argue that the Commission should be reauthorized. We believe that it is sapping the agency's strength and the staff morale to continue to operate on one-year continuing resolutions.

Two years ago this same group of organizations came before the subcommittee, and while conceding that the Commission was not doing a good job for consumers, argued that it should be reauthorized, because we thought that cryogenesis might work, the freezing of the body until a cure could be found. And, indeed, looking down the road, even in the short term it appears that political science is about to make a major breakthrough, and that there may be some changes at the Commission that give the body a chance to recover and perhaps to be as vigorous as it ever has been.

We would urge that in your bill you not have any special provisions for advertising under the Commission's unfairness rulemaking. We think that the advertisers and advertising business have been riding that horse for too long, and it is time to get off, and it is standing in the way of a reauthorization.

The details are contained in my prepared testimony, and I will not go through that; but I would be happy to answer questions about it. We also think that it is unnecessary, and indeed, the ABA report indirectly, I believe, recommends against codification of unfairness, because it says that the Commission's policy statement of 1980 goes a long way toward defining that jurisprudence, and that further small details should be developed through appropriate selected proceedings.

We urge the committee to authorize the Commission to engage in the studies of insurance without awaiting the outcome of pending bills in other committees regarding the McCarran-Ferguson Act. We think that is an important area for the Commission at least to engage in economic and law enforcement oriented studies, even if it does not now have the authority to enforce the law.

We support the controversial intervention program of the Commission. We believe that its credibility requires, at least in the short term, some limits to be placed on it over the course of the reauthorization. We would want to see in the reauthorization bill a requirement that any Commission intervention in state legislative proceedings be requested, not initiated by the Commission on its own; that a limit of five percent of the Commission's resources be placed on direct expenditures of the program; and that there be an annual report to the authorizing committees of the House and the Senate on that program's operation.

We would recommend, however, that rather than amending the FTC act to make those restrictions permanent, that it simply be a title in the reauthorization bill, and that it sunset with the bill, and that we take another look at that three years down the road when the committee has had three annual reports and some experience as to how the program has worked with those restrictions.

Very important, we believe, is the increase in the agency's resources. Other witnesses have documented it. I have some information in my prepared statement about how the Commission's resources have fallen drastically. Whether you take a short term view of 300 work-years lost since Chairman Miller department and Chairman Oliver took office, or a 48 percent decrease in total work years since 1979, short view or long view, the agency does not have the resources while the problems are getting bigger. And we would recommend that in each of the three years of the reauthorization that there be an additional 200 work-years supported by the authorized appropriation, for a total of six hundred.

Now, that may sound drastic, and you may say if the agency is not doing its job, how can it absorb that. I do not think it is all going to get appropriated, but I think it should be authorized, and the possibility should be there.

Finally, and most important, the most important thing, even above reauthorization, that the subcommittee can do is to send a message to the Commission to replace economic ideology with economic and legal pragmatism. The agency over the last few years has been run by people who have hardly ever seen a market imperfection, who have hardly seen a high barrier to entry, and who have hardly ever seen a piece of deceptive information, proceeding against which will not in their mind create the greater risk of driving good information out of the marketplace. And I think that explains a lot of why many of the witnesses before these hearings over the last two days have been extremely critical of the Commission.

[The statement and questions and answers follow:]

STATEMENT OF MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION

Mr. Chairman and members of the Subcommittee, I appreciate your invitation to testify on the reauthorization of the Federal Trade Commission and on the agency's performance and effectiveness. I am the Director of the Washington Office of Consumers Union.[1] I am testifying, as well, on behalf of the Consumer Federation of America[2], the National Consumers League[3], Public Citizen[4] and the U.S. Public Interest Research Group[5].

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 4 million circulation, regularly carries articles on health, product safety, marketplace economics and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

[3] The National Consumers League, the pioneer consumer organization in the country, has worked for safety and fairness of consumers and workers since 1899. Today, the League works to insure that hard-won consumer and worker protections are enforced and updated by supporting necessary regulatory action.

[4] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its over 60 thousand members and all consumers.

[5] U.S. Public Interest Research Group is the national lobbying office for state PIRGs around the country. PIRGs are nonpartisan, nonprofit consumer advocacy groups.

THE NEED FOR THE FTC

The Federal Trade Commission is an essential force for fairness in the national marketplace for consumer goods and services. It is charged by law with prohibiting unfair or deceptive acts or practices and unfair methods of competition.

It is clear that in recent years the FTC has fallen far short of achieving its Congressional mandate. Never has it had sufficient resources to do so. Indeed, when the Congress in 1914 created the FTC, it did not expect the agency ever fully to achieve its ends, for it wisely foresaw a marketplace in which the practices of sellers would be ever-changing, chameleon-like, in response to changing conditions and to the development of the law under the then-new legislation.

Further, the agency's own view of its mission --and the view of the Congress as well-- changes cyclically, so that the FTC seems to alternate periods of activism with periods of relative inactivity. Nonetheless, few would deny that in the long-run the American marketplace is more honest, more fair and more competitive because, since 1914, we have had a Federal Trade Commission.[6]

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[6] Report of the American Bar Assocation, Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission, April 7, 1989, reprinted as a special supplement to BNA Antitrust & Trade Regulation Report, April 6, 1989. ("ABA Report"; page references are to the BNA reprint). The Report, while not specifically addressing the performance of the agency, implicitly accepts in its review of the agency's structure and functions the FTC's basic role in policing the marketplace.

THE NEED TO REAUTHORIZE

It is the view of the organizations on whose behalf I testify today that the FTC's performance over the past few years has been seriously inadequate -- that the agency has been on the downward slope of its cycle of activity and inactivity. I will address this subject with some particularity later in my remarks. Nonetheless, taking an historic overview of the agency's importance to consumers, we believe that it is now time for the Congress to reauthorize the Federal Trade Commission. The Congress has not done so in nine years. Reauthorization for a three-year period would help to relieve the agency of the resource drain that goes into annual reauthorization efforts. And, it could help to reverse the demoralizing effect on the FTC staff that has been created by recent staff cuts, inappropriate leadership and other factors that stand between competent career employees and the satisfaction of a job well done.

Two years ago, we told the Subcommittee why we wanted the Congress to reauthorize an agency that we believe has performed very poorly for several years. Our reasoning was that cryogenesis --preserving a life in danger by freezing it until a cure can be found-- might work in the case of the FTC. We still believe that this is the case. Indeed, political science may be closer than ever to producing a cure. The chance of a breakthrough would be greatly enhanced if the President would hasten to fill now-vacant Commissionerships and would assure that those and all future appointees will believe in the statutory mission of the agency and meet high standards. Indeed, the President would do well, in selecting new FTC leadership and in filling all future FTC vacancies, to observe the standards suggested in the ABA Report.[7]

NO SPECIAL TREATMENT FOR ADVERTISING PRACTICES

Consumer organizations do not, however, support reauthorization at any cost. We continue to oppose any special treatment for advertising under the FTC's unfairness rulemaking authority. We see no reason why advertising should be treated differently in this respect from any other form of marketing and promotion. The arguments made by advertisers and advertising agencies seem to apply to them no more and no less than to other entities or to entities engaged in other marketing practices.

The request for special treatment arose in 1980 as a response to the then-ongoing 'children's advertising' rulemaking. The meaning of "unfair" was said to be so vague that it gave the FTC _in terrorem_ enforcement powers. Whatever the merits of that argument, the FTC has long since adopted a policy statement that sets out reasonable criteria for determining a practice to be "unfair".[8] We see no continuing reason for the advertising community's request for special treatment.

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[7] ABA Report, p. S-7.

[8] Letter from Federal Trade Commission to Senators Ford and Danforth dated December 17, 1980; see also Credit Practices Rule, Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740 (1984).

Requests for a special exemption for advertising practices remain no more than one among a number of special interest pleas that have been pressed upon the Congress over the years.[9] If the advertisers and agencies have their way, unfairness rules could apply to direct marketing practices such as product labelling, door-to-door sales, telemarketing, free sample promotions and other promotional and sales practices, but not to advertising.

The requested exemption would present practical difficulties. For instance, the FTC may want to address a marketing practice involving a mix of advertising and other (for instance, labelling) practices, that present a combination of deception and unfairness elements, and that are best cured, at least in part, by a labelling requirement. Two such existing FTC rules are the motor fuel octane rule and the home insulation R-Value labelling requirement. In such situations, the FTC probably cannot practically unbundle either the advertising and non-advertising aspects of the practice or the deception and unfairness elements of the problem. If the FTC cannot address the advertising portion of the practice by unfairness rulemaking, it probably cannot practically address any portion of the problem. Yet, those two rules are among the more valuable provisions that the FTC has adopted to correct situations in which consumers were faced with heavily advertised, confusing product claims. It is true that they had a deception as well as an unfairness element to them. But it is also true that the unfairness element was an important part of the FTC's basis for developing a rule.

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[9] Among these have been requests, some successful, some not, for special treatment for soft drink bottlers, brewers, used car dealers, funeral directors, agricultural cooperatives, doctors, lawyers, advertisers and advertising agencies, all of whom profess to believe in the FTC's mission of policing the marketplace -- except as it applies to some sensitive aspect of their own marketplace practices. Reauthorization legislation has been the vehicle for some of these self-serving efforts.

In summary, there is no justification for such a special exemption. And, it could be mischievous. We urge you not to adopt a special provision for advertising.

NO CODIFICATION OF "UNFAIRNESS" DEFINITION

Similarly, we see no need for codification of a definition of unfairness. The FTC's standards have been articulated.[10] As we understand the position of advertisers, they seek merely to codify those standards. The ABA Report itself suggests that the FTC's policy statement on rulemaking has "made a major contribution to Commission jurisprudence". It suggests that further fleshing out of the policy should occur "through careful application in cases".[11] Until that has happened, we see no reason for committing the policy statement to the greater permanence of statutory status.

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[10] See note 8, supra.

[11] ABA Report, p. S-11.

FTC JURISDICTION OVER INSURANCE

We support restoration of FTC's maintenance of competition and unfair or deceptive practices jurisdiction over the business of insurance. Consumers around the nation have revolted against the industry's economic stranglehold on insurances rates and practices and on many state insurance regulatory systems. There are now bills pending that would achieve that goal by modifying or repealing the McCarran-Ferguson Act. Pending the outcome of those proposals, we urge the Subcommittee to include in reauthorization legislation a provision authorizing FTC to conduct economic studies of insurance markets and practices. We ought at the very least to be able to learn in the meanwhile more about the problems that the federal government currently abstains from addressing.

THE FTC INTERVENTION PROGRAM

Since its early years, the FTC has engaged in the advocacy of pro-competitive policy before other federal and state governmental bodies considering measures that may restrict competition. Historically, this program has been a small but important part of the agency's mission. But there is a perception that during the present decade this program has drawn on an undue share of the Commission's resources. The FTC leadership argues strongly to the contrary.

The perception may well arise from these facts: (1) the current FTC leadership has overemphasized the importance of the intervention program in the scheme of the FTC's overall responsibilities; (2) the program recently has reflected the same zeal in asserting "free market" analyses unfettered by empirical considerations that has characterized the current leadership's approach to the competition and consumer protection missions; (3) correspondingly, there have been few, if any, interventions that identify a need for governmental action in the marketplace and the emphasis has been exclusively on governmental non-intervention; (4) at least some of the interventions addressed to state legislative bodies seem to have been volunteered by the FTC, unsolicited by the legislatures, creating the impression that the FTC has been "meddling" in state legislative business at the same time that it is under criticism for not doing its own job.

We believe that, despite the unfortunate perceptions and realities of the program under the FTC's current leadership, a small intervention program is an important function for an FTC that is properly carrying out its more direct statutory mission with the great preponderance of its resources. Only new leadership can restore balance to the program. In the meantime, further assurances are required to restore confidence in the program's long-term mission.

To achieve this goal, reauthorization legislation should (1) limit intervention in the legislative proceedings of states and their subdivisions to instances where there is a written request for intervention by a member or committee of the legislature; (2) limit direct intervention program expenditures to 5% of the FTC's annual appropriation and require an annual accounting for the program; and (3) require an annual report by the FTC to its authorizing committees of the intervention program's activities and expenditures. These provisions should not become permanent by amendment to the Federal Trade Commission Act, but should sunset with the reauthorization. The Subcommittee should then re-evaluate these requirements as part of the next reauthorization.

THE COMMISSION'S RESOURCES ARE INADEQUATE

The resources of the Federal Trade Commission have shrunk, even as the economy and the dimensions of problems under the FTC's jurisdiction have grown. The number of "work years" that the FTC's appropriations buys has dropped by 48% since 1979. This has occurred in the face of the greatest merger wave in the nation's history and during a period when states have found it necessary to prosecute deceptive advertising cases that the FTC traditionally would have handled.

In FY 1979, the Commission had 1,700 work years to perform all of its functions. When Chairman Oliver replaced Chairman Miller, the agency had approximately 1,200 work years. In FY 1988, that number had fallen to 990 work years. In last October 1, the beginning of FY 1989, it was required to make a further reduction to approximately 900 work years, as a result of a federal pay raise with no concommitant increase in appropriations.[12] To achieve that level, 34 additional employees were dismissed from service.[13] We believe that this trend is not good for the FTC's performance --and that certainly is not good for the American consumer.

We urge the Subcommittee to reverse this trend. The appropriation authorized for the FTC for the period of the reauthorization should be increased sufficiently to support an increase in work years of approximately 200 annually, or a total of 600 work years by the end of the reauthorization period.

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[12] "FTC Advertising Regulation-- New Directions?", address by Commissioner Andrew J. Strenio, Jr., before the American Advertising Federation, Chicago, Illinois, November 15, 1988.

[13] "The FTC in 1989: Rising From the Ashes?", address by Commissioner Andrew J. Strenio before the Symposium on the Future of Marketing and Advertising Regulation, Notre Dame, Indiana, May 1, 1989.

ECONOMIC IDEOLOGY AT THE FTC

We do not rate the performance of the Federal Trade Commission over the past few years as acceptable, as to either its consumer protection or its maintaining competition mission. It has opposed very few mergers in the face of the largest merger wave in America's history. It has dealt with very few national advertising cases until very recently, and then only in the face of enormous criticism from consumer advocacy groups and the undertaking of the FTC's advertising enforcement functions by states' attorneys general.

This failure we attribute primarily to the orientation of FTC leadership during the 1980's toward rigid, ideological application of free market (i.e., "Chicago School" or "Friedmanite") economic theories to virtually every aspect of the agency's work. Empirical economics came to a virtual halt. Although our economy is a mixed economy with many market imperfections, higher authority at the FTC could find hardly a single market imperfection or a high barrier to entry anywhere. No governmental role was a good governmental role. No information was sufficiently deceptive that some consumer somewhere would not place some value on receiving it. Every possible challenge to deceptive advertising was judged to run the greater risk of driving out good information. The agency's leadership had never seen a vertical agreement that they did not like, and objectionable mergers were almost as rare.

While economic viewpoints cannot be mandated through legislation, there is little this Subcommittee can do regarding the FTC that would more greatly benefit the American consumer than to use both its oversight function and its power of confirmation to persuade the FTC of the 1990's back into the empirical economics mode that has been its mainstay for most of its history. Neither Section 5 of the Federal Trade Commission Act nor any other statute administered by the agency contains legislative asumptions that little or nothing is wrong with markets. Rather, the Congress has assumed in passing these various legislative acts that some things are and will continue to be wrong with at least some aspects of mixed economy markets. Otherwise, the legislature would not have acted. You, the Congress, must renew this message to the Federal Trade Commission if it is to enter the 1990's as an effective defender of competition and consumer rights.

SUMMARY

Mr. Chairman, we urge the Subcommittee to reauthorize the Federal Trade Commission for three years by enacting legislation along the lines indicated in this statement. Equally important, however, we urge you to redirect the agency out of the torpor of stodgy, unrealistic ideology imposed on it by recent leadership and back into the reality of protecting consumers and competition.

Consumers Union
Publisher of Consumer Reports

June 23, 1989

Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
Committee on Commerce, Science
and Transportation
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am attaching to this letter for inclusion in the record of hearings on reauthorization of the Federal Trade Commission my responses to the additional questions posed in your letter of June 12, 1989 (just received).

I appreciate the opportunity to address the concerns you have raised. If there is any further information I can provide, please let me know.

Sincerely,

Mark Silbergeld

Mark Silbergeld
Director,
Washington Office

Washington Office
Suite 520, 2001 S Street, Northwest • Washington, D.C. 20009 • (202) 462-6262

Q: You are critical of the recent leadership at the FTC. Do you believe that the Committee should consider including in its reauthorzation bill requirements for nominees to the FTC -- for example, that any nominee have training in the law or economics, or be a recognized expert in his or her field? If so, what should these criteria be?

A: I believe that the Committee should have some benchmarks by which to judge nominees and to act on nominations, but that these cannot be effectively codified. At one time, the statutory provision establishing the Office of the Attorney General of the United States provided that that officer should be "learned in the law". The codification of the qualification has not always assured the result. Further, the qualifications for holding the position of FTC Commissioner are not limited to any particular one or two fields of expertise. Until the 1980's virtually every Commissioner held a law degree. In the 1980's, economists were among the appointees. Without respect to the performance of the individuals involved, that broadening was appropriate in concept. Additionally, persons with backgrounds in business organization and behavior, marketing and consumer behavior are among those who might be appropriately considered. Further, the leadership that has not performed adequately consists of lawyers and economists, just as has the leadership that in the past has performed adequately.

Because the existence of the qualifications of prominence in field of endeavor of and intellectual soundness are more subjectively determined in individual cases, I believe that the Commmittee must undertake the burden of examining the strengths and weakenesses of individual nominees and measuring it by what the Committee considers to be appropriate, objective qualifications. In the 1970's the Committee did an excellent job of obtaining from FTC nominees prior to confirmation hearings their views on the goals, missions and performance of the FTC and using those responses at hearing to create a public record by which it could then measure the nominee in the course of future oversight hearings. Of course, no process can assure the truthfulness of a nominee's representations as to how the nominee views a Commissioner's obligations, nor the nominee's faithfulness to answers at a nomination hearing once in office. However, the process of submitting written answers to the Committee's questions and testifying as to those answers before the Committee would seem to help assure that the Committee and the nominee share the same general goals regarding the agency's performance -- unless, of course, the nominee has some hidden agenda.

Q: The Attorneys General are actively pursuing advertising cases, for example, against car rental companies and allegedly misleading airline advertisements.

--Do you feel that the Attorneys General are merely filling a void created by the FTC, or are there legitimate state interests that cannot be overseen by the FTC, and therefore require this kind of state action?

--How do you respond to the concern that this state-by-state effort will lead to inconsistent results?

A: This may be a chicken-and-egg dilemma. The FTC Act and the states' "little FTC acts" have similar, often identical purposes. Thus, the states have a legitimate interest in the areas you have identified. Traditionally, the division of labor has been undertaken cooperatively, according to the scope of the problem. The FTC pursued problems that were regional or national in scope, while the states handled matters that were local or statewide. But the failure of the FTC to cooperate with the states, or to do its job in the 1980's, has caused the Attorney's General to step in where the scope of the problem is regional or national. And the feeling that they needed to do so may have been enhanced by the focus of the FTC's intervention, or competition advocacy, program on telling states not to regulate in response to certain perceived problems. While the problems the states are now addressing are of legitimate state concern, there is a good argument that law enforcement efficiency could be enhanced by closer adherence to the earlier division of labor concept. BUT, this presupposes an active, adequately-funded FTC.

The Attorneys General appear to have adequately coordinated their activities in these areas through NAAG. But there is a likelihood of inconsistent results as matters are litigated and appealed through the courts and judicial interpretations of actions brought under NAAG guidelines begin to diverge. This is not necessarily undesirable. If inconsistency reaches a level that creates serious economic inefficiencies, we can rest assured that the very businesses that originally rejoiced in a lack of federal attention will approach the Congress, requesting that attention to be revisited upon them in order to turn diversity into uniformity.

Q: The Kirkpatrick Committee Report states that the FTC and the states should develop a better working relationship. The Report suggests that the FTC should focus on national or regional issues, leaving matters affecting one state to state officials.

-- Do you agree with the Report?

-- How would this division of responsibility benefit or harm consumers?

A: The FTC and the states should, of course, establish a better working relationship. They had one before the FTC leadership of the 1980's decided that it could not speak to persons holding different, less doctrinaire economic views. So, the first move would seem to be up to the FTC. As a matter of working agreement, the division of labor suggested by the Report makes sense, though I would not be so strict as to suggest that two or three states should not cooperatively attack a problem in common instead of leaving it to the FTC. There are issues other than jurisdictional lines, such as staff experience and expertise, that are relevant in determining which agency should handle a given enforcement matter. Consumers could be harmed, however, by formal agreements limiting state exercise of jurisdiction over regional and national matters. This would leave the FTC free to ignore its responsibility such matters without regard to state enforcement. Then, consumers would have no protection from the unlawful practices involved.

Q: You suggest that the FTC be given authority to study the issue of insurance again.

--What specific benefits would be gained for consumers if this authority were restored to the FTC?

--Under current law, the Senate or House Commerce Committees can request that the FTC conduct those studies. Isn't that sufficient? Why or why not?

A: Studies help to identify and analyze problems that require solutions. And they help, directly or indirectly, to identify the kinds of solutions that may be appropriate. Perhaps most importantly, the FTC seems very well equipped to perform studies that identify the structural problems of the insurance industry. The activity of the FTC in studying insurance could provide much information that less than aggressive state regulation has failed to provide, pointing to the need for specific solutions to specific causes of perceived problems (e.g.g., high premiums, limited access, particular marketing practices). This could, in turn, increase the pressure both on the industry to improve its practices (and to abandon or curtail clearly illegal practices) and on states to improve the performance of their regulatory responsibilities. The authority of the Commerce Committees to request insurance studies by the FTC has not been exercised very widely, even though the public criticism of specific aspects of the industry's performance has steadily grown over the past few years. That the authority by itself is therefore is not sufficient would seem to speak for itself.

Q: Being as specific as you can, please identify areas that you think the FTC needs to improve, and prioritize them.

A: The FTC needs to (1) analyze seriously and challenge many more merger submissions under the Hart-Scott-Rodino Act, (2) beef up its national advertising enforcement campaign, (3) focus more of its activities on important, "big ticket" goods and services (4) add marketing and consumer behavior expertise to the economic and legal resources with which it addresses Bureau of Consumer Protection matters, (5) enforce the law against vertical restraints, (6) resume its function as the source of empirical, economic studies that academic economists will not perform of industries within its antitrust purview, and (7) evaluate and improve the administration of its individual functions, especially regarding legal functions.

Senator **Bryan**. Mr. Silbergeld, we appreciate your testimony. Ms. McDermott.

STATEMENT OF KATHERINE McDERMOTT, REPRESENTING THE U.S. CHAMBER OF COMMERCE

Ms. **McDermott**. Thank you, Mr. Chairman, Senator Gorton.

As you stated, I am here today on behalf of the U.S. Chamber of Commerce, and I will try to very briefly summarize the testimony which we have presented.

I think the Chamber has three main issues it would like to address today. First, along with, I gather, the preponderance of the witnesses here, we urge you to swiftly reauthorize the agency in this Congress. We think it is critical. We think it has been too long unauthorized.

Second, we want to suggest that in a time of limited resources, as Mr. Silbergeld just detailed, it is important for the Commission carefully to use what resources it has. And third, the Chamber has, over the last several Congresses, supported certain amendments to the FTC act which we believe can be taken care of in this reauthorization process; and I will just briefly review those.

On the subject of reauthorization I will not speak further, because I think it has been stated very eloquently. There has been criticism of the Commission from the left and from the right over the last 8, 10, 20 years, but I do not think anyone quarrels with the idea that the Commission has a very useful role to play in establishing and implementing national antitrust and consumer protection policy.

We are in general agreement with the ABA special committee's report that no radical changes are called for at the Commission. We appreciate and hope that this Commission will continue to preserve the emphasis on economic analysis and the respect for market forces in maintaining a competitive economy. It has, for the most part, characterized its enforcement decisions over the recent years.

With Mr. Silbergeld we also support a continuation of the Commission's, yes, sometimes controversial competition advocacy program. But we think it is of critical importance, and one that should not be lost even in a time of declining resources.

We agree, too, that authorization may not alone be enough to ensure appropriate enforcement policy consistent with congressional mandate. This is a time of declining resources and many demands on these resources, and the Commission is going to have to focus on those aspects of its mandate that are most appropriate for a national agency to carry out.

What does this mean? Well, it may require that the Commission coordinate more with state and local enforcement agencies. Certainly other witnesses have suggested this, and we think that is important.

The coordination on the subject of telemarketing fraud has been a very successful endeavor on behalf of the Commission and the states, so far as we have been able to tell. We do caution that whatever coordination is undertaken should be consistent with the development of national policies with respect to antitrust and consumer protection.

We would stress, however, that the Commission cannot be expected to make up entirely on its own for the tremendous loss in resources that it has suffered over the last 10 years. We have no particular level of authorization to suggest, but we do wish that this committee would take into consideration the difficulties that face this and other agencies at this time.

As to particular aspects of Commission policy, many of the Chamber's concerns were addressed in the legislation passed overwhelmingly by the Senate in the last Congress in S. 677. The Chamber continues to support the approach of that legislation, and I would just like to review two or three of the issues that were of most concern to us then and which remain of continuing concern to the Chamber.

First was the uncertainty that surrounds the definition of the term "unfair acts or practices." The Chamber also believes that the Commission's statement on unfairness was a very important development, giving much needed guidance to the business community, as well as to consumers, as to what standards of conduct were expected of business in this area.

We do not believe, however, that we can rely upon a policy statement alone, because there is simply no guarantee that future Commissions are going to enforce the policy statement in the way it has been enforced in the last eight years. So we do support codification, and we believe that the approach of S. 677 is a good way to proceed.

The Chamber also supports repeal of section 5(m)(1)(B) of the FTC act, because we believe that it, in effect, turns cease and desist orders into rules of general applicability without even the minimal due process procedures inherent in the APA, and certainly lacking the due process procedures required for Magnuson-Moss rulemaking.

We have traditionally supported repeal of this provision as the most sensible way of dealing with it. But at a minimum we believe the approach of S. 677, which provided that the section will apply only to litigated orders and requires that the issue of legality be fully relitigated in subsequent proceedings, is required at a minimum.

Other issues with which we continue to be concerned are the need for requiring a prevalent standard in Commission rulemaking. And finally, the Chamber strongly endorses regular congressional oversight within the scope of the law to provide a better check on agency rulemaking and to help prevent regulatory abuse.

The Chamber believes that Congress has a critical role to play in keeping the FTC, its own agency, on track by conducting broad reviews of Commission programs and plans, albeit leaving oversight and review of particular cases primarily to the courts.

And, in closing, I would simply like to re-emphasize the need to reauthorize the Commission in this Congress.

[The statement and questions and answers follow:]

STATEMENT
on
THE FEDERAL TRADE COMMISSION
before the
SUBCOMMITTEE ON CONSUMER
of the
SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
for the
U.S. CHAMBER OF COMMERCE
by
Kathleen McDermott
June 8, 1989

The U.S. Chamber of Commerce appreciates this opportunity to express its views on the need for legislation reauthorizing the Federal Trade Commission (FTC or Commission). The reauthorization process is an opportunity for Congress to confirm its support for the agency and for sound enforcement policies that have benefitted consumers and the business community alike. It is, of course, also a valuable opportunity for Congress to establish ground rules for the agency's future administration of Section 5. The Chamber has two main objectives in appearing before you today. First, we support reauthorization for the agency. Second, we urge the Commission carefully to examine how it uses its resources. The Chamber supports several amendments to the FTC Act that would provide much needed clarification and guidance to both the business community and the Commission in interpreting its mandate from Congress.

The Chamber believes that it is critical that this Congress pass legislation reauthorizing the Commission. Over the last 20 years, there has been criticism of this agency from, variously, those who believed it interfered too much in the workings of the marketplace and those who believed that it failed to intervene when necessary. But, despite this criticism, there is no question that the Commission has played an should play a useful role in enforcing the nation's antitrust laws and in preventing consumer injury from commercial misconduct. In this respect, the Chamber is in general agreement with the recent "Report of the American Bar Association Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission," which concluded that no radical changes are called for at the Commission. In particular, the Chamber hopes that this Administration will preserve the emphasis on economic analysis and the respect for market forces in maintaining our competitive economy that has for the most part characterized the Commission's enforcement decisions in recent years. Similarly, the Chamber believes that the Commission's Competition Advocacy program, whereby the agency participates in federal, state and local agency proceedings, making its considerable economic expertise available on a variety of competitive and consumer protection issues, is an important effort. It is consistent with Congress's original intentions for the agency and is a useful tool to assist in preventing harm to competition that might otherwise flow from unwise government restrictions.

Thus, while the Chamber generally supports the Commission's current course, it recognizes that the agency's policies and programs potentially are subject to radical shifts and changes of direction with every change of the individuals who constitute the Commission. This creates uncertainty and confusion, which Congress can and should dispel. As the Commission itself has recognized, it is "entirely proper" for Congress to "provide as much guidance as feasible to administrative agencies" in the form of more precise statutory standards for the benefit of both the "regulated" and "regulator."[1]

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[1] Letter of Commission per Chairman Miller to Senators Packwood and Kasten dated March 5, 1982 at pp.8-9.

For several years, consumers and the business community have operated in a climate of uncertainty and confusion with respect to the jurisdiction of the Commission and the standards of behavior deemed inappropriate by that agency. Although the Chamber has previously focused on the uncertainty caused by lack of definition of "unfair or deceptive acts or practices" and "unfair methods of competition," the failure of Congress to reauthorize the Commission for the last six years has led to confusion over more than just those terms; it has created doubt as to the very role of the agency. The issue that will be before the Subcommittee as the reauthorization process proceeds are too important to leave in such an indefinite state.

Reauthorization alone may not, however, be enough to ensure appropriate enforcement of the law, consistent with Congressional direction. For that to occur, the agency must carefully use its staff and resources. On this subject too, the Chamber echoes the concerns expressed by the ABA Antitrust Section's Special Committee: that the FTC workyears are only 53 percent of what they were ten years ago and that, as the Commission has been reduced in size, it has become top-heavy, both in the operating bureaus and at the Commission level. Obviously, in this time of severe budget deficits and scarce resources, it is incumbent on the Commission to make the best possible use of its resources. This requires that it focus on those aspects of its competition and consumer protection mission that are best undertaken by a national agency. It may require the Commission to coordinate more with enforcement agencies at the state level, as has been done in the area of telemarketing fraud, where such coordination is consistent with the development and execution of a national antitrust and consumer protection policy. The Commission cannot, however, be expected to make up entirely on its own for the decline in real resources it has suffered. While we do not have a particular appropriations level to recommend, we recognize how difficult it is for this Commission, and certain others to operate in this time of scarce resources.

When the Chamber testified before this subcommittee in 1982, it recommended specific legislative solutions to a number of what it perceived to be long-standing problems with the Commission's enforcement of its mandate. As the Chamber testified in February of 1987, many, but not all, of the Chamber's concerns and suggested solutions were reflected in the FTC Reauthorization Act passed overwhelmingly by the Senate. The Chamber supported and continues to support the approach of that legislation. This morning I would like briefly to review those issues addressed in 1987 that continue to be of chief concern to the business community.

One overriding concern continues to be the uncertainty that surrounds the definition of the term "unfair acts or practices" under Section 5 of the FTC Act. At some periods in the past, the Commission has operated on an essentially unrestricted basis in determining what constitutes "unfair" acts or practices. In particular, relying on consumer injury as the basis for a finding of unfairness has at times permitted the agency to use subjective perceptions of consumer impact as an excuse to attack practices that involved neither falsehoods, reckless claims, or intentionally misleading practices. In 1980, however, the Commission issued a unanimous statement explaining the circumstances under which consumer injury would be relied on as the basis for an unfairness finding.[2] Under that formulation, an actionable consumer injury must be substantial, not outweighed by an offsetting consumer benefit that the practice produces, and one that consumers reasonably could not have avoided.[3] The Commission since has applied that standard, notably in its 1984 International Harvester decision.[4] No guarantee exists, however, that future Commissions will continue to give the term a similarly reasonable, objective construction. Therefore, we urge Congress to provide much needed guidance in this area by amending the FTC Act to provide a statutory definition. Previously, the Chamber has proposed a standard to define "unfair or deceptive acts or practices" to be those that:

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[2] Letter from the Commission to Senators Ford and Danforth dated Dec. 17, 1980 ("Unfairness Statement").

> . . .directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition.

Similar language was adopted by the Senate in S. 677 to define "unfair" practices under the FTC Act. Such an amendment would not impair the Commission's ability to prevent actual unfair practices. Rather, it would inject clarity and certainty into an area of the law that otherwise will continue to confuse both business and consumers as to the required standards of behavior.

The Chamber also supports repeal of Section 5(m)(1)(B) of the FTC Act, which authorizes the Commission to seek civil penalties of up to $10,000 per violation against companies for violations of cease and desist orders issued in proceedings to which they were not parties. In effect, Section 5(m)(1)(B) turns cease and desist orders into general rules without even the minimal due process applicable to agency rulemaking under the Administrative Procedure Act, much less the stringent procedures required under the Magnuson-Moss Act. This provision's chief defect is its failure to safeguard a respondent's right to a reasonable opportunity to defend the legality of its conduct. In addition, as the Chamber has pointed out on prior occasions, the Section suffers from vague and ambiguous drafting, leaving it uncertain, for example, whether civil penalties could be premised upon in violation of a consent order. The Chamber has testified before and continues to believe that the most sensible solution to the Section 5(m)(1)(B) problems is repeal of the provision in toto. In any event, basic fairness and due process demand at a minimum that the approach of S. 677 be followed, which provided that Section 5(m)(1)(B) applies only to litigated orders and that the Commission be required to litigate the legality issue fully and fairly against all industry members that may be affected before civil penalties can be imposed.

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[3] "Unfairness Statement" at pp. 5-7.

[4] International Harvester, Co., 104 F.T.C. 949,1060-1067 (1984).

Other issues with which the Chamber continues to be concerned include requiring a "prevalence" standard for Commission rulemaking and increased Congressional oversight of the FTC. S. 677 addressed the first of these issues in detail. Requiring the Commission to determine that an allegedly deceptive or unfair act or practice is prevalent in an industry before embarking on industry-wide rulemakings would, we believe, do much to avoid wasteful expenditures of Commission and private resources on ill-conceived rulemakings. Regular Congressional oversight, within the scope of the law, also would provide a better check on agency rulemaking and would help to prevent regulatory abuse. The Chamber believes that Congress has a critical role to play in keeping the FTC on track, by conducting broad reviews of Commission programs and plans, albeit leaving oversight and review of particular cases to the courts.

Overall, the Chamber believes that the above-mentioned reforms are essential to providing a more predictable climate for businesses and consumers. These reforms are timely; they will provide necessary guidance to the FTC and allow the FTC to play a vital role in protecting competitive business practices and the interests of consumers.

Finally, we reemphasize the need to reauthorize the FTC during this Congressional session. We hope that this Subcommittee and Congress will take swift action to reauthorize the FTC.

RESPONSE TO QUESTIONS OF SENATOR BRYAN TO KATHLEEN McDERMOTT, REPRESENTING THE U.S. CHAMBER OF COMMERCE

Q. YOUR TESTIMONY ADDRESSES THE POINT THAT THE LACK OF AN FTC AUTHORIZATION HAS CREATED DOUBT AS TO THE ROLE OF THE AGENCY AND CONFUSION ABOUT JURISDICTION AND EXPECTED BEHAVIOR ON THE PART OF BUSINESS AND CONSUMERS.

-- PLEASE CITE SPECIFIC EXAMPLES WHERE YOU THINK THE FAILURE TO REAUTHORIZE THE FTC HAS BEEN HARMFUL.

RESPONSE:

The Chamber of Commerce cannot point to specific examples where the enforcement mission of the Federal Trade Commission has been harmed because of the failure on the part of Congress to reauthorize the agency. The Chamber does believe, however, that the continual failure to reauthorize the Federal Trade Commission sends the message to business and to consumers that Congress lacks confidence in the agency, that the agency is irrelevant, and that its positions on vital matters affecting competition and the public interest can be disregarded. The Chamber believes that it is inappropriate for Congress to fail to reauthorize what is, after all, its own antitrust and consumer protection agency, and we urge the Congress to rectify this problem immediately.

Q. THE KIRKPATRICK COMMITTEE REPORT SUGGESTED THAT THE FTC HAS BECOME "TOP-HEAVY" WITH TOO MANY "CHIEFS" AND NOT ENOUGH "INDIANS" (page 95). THIS INTERFERES WITH THE AGENCY'S EFFECTIVENESS BECAUSE IT MAKES THE DECISION-MAKING PROCESS SO CUMBERSOME AND REDUCES THE STAFF WHO CAN BE ON THE FRONT LINE FIGHTING ISSUES THAT SHOULD BE ADDRESSED.

-- DO YOU HAVE SPECIFIC SUGGESTIONS AS TO HOW THE FTC MIGHT CONSIDER RE-DIRECTING ITS RESOURCES?

RESPONSE:

As the Kirkpatrick Committee report indicated, the problem with the current allocation of resources as between upper management and staff attorneys is that as the total number of staff in the agency has been reduced, the number of "chiefs" has remained virtually the same. The Chamber believes that the resulting problem is not so much that the decision-making process has become cumbersome but, rather, that there are insufficient staff attorneys, economists, and consumer protection specialists who can be employed in identifying and challenging antitrust and consumer protection issues that need to be addressed by the federal agency. Therefore, it seems logical that some attention should be paid as to whether reduction among top management can be made. The agency might also revisit the question of whether regional offices contribute adequately to the enforcement mission of the agency, and whether they can be reorganized or reduced in staff size without limiting the effectiveness of the Commission. In addition, the agency should consider whether it could make effective use of the resources of various state antitrust and consumer protection offices, particularly with respect to identifying and challenging potentially anticompetitive or anticonsumer practices that have a primarily local or regional effect.

Q. YOU SUPPORT THE FTC'S CONSUMER ADVOCACY PROGRAM. PAST VERSIONS OF AUTHORIZATION LEGISLATION HAVE IMPOSED RESTRICTIONS ON THE FTC'S ABILITY TO CARRY OUT THIS PROGRAM.

-- DO YOU FAVOR SUCH REQUIREMENTS AS THAT COMMENTS BE MADE ONLY ON REQUEST, THAT THERE BE A LIMIT ON THE RESOURCES THAT MAY BE COMMITTED TO THE PROGRAM, THAT CONGRESS BE NOTIFIED, AND THE LIKE?

RESPONSE:

The Chamber does not have a policy as to whether restrictions should be imposed on the FTC's competition/consumer advocacy program, but has generally supported this program as a vital part of the Commission's mission. Our understanding is that the Commission does not undertake to make comments as part of the program unless they are requested by the federal or state agency, or state legislature involved; but we would not favor writing such a requirement into law. We believe that this is a relatively low resource-intensive program, and that Congress does not need to place a limit on the resources that the agency may commit to the program. As we indicated in our testimony, however, this may be one aspect of the Commission's mission in which the states could be enlisted as more active partners. That could result in considerable cost savings to the Commission. We would not recommend that Congress be notified in advance of the Commission's undertaking to make or file a comment as part of this program. The Commission's activities in this area, as in others, should be included in annual reports to Congress in order to assist in effective, but not overly intrusive, oversight.

Q. YOU SUPPORT REQUIRING THAT ACTIONS BE "PREVALENT" IN AN INDUSTRY BEFORE THE FTC UNDERTAKES A RULEMAKING.

-- WHY IS THIS REQUIREMENT APPROPRIATE?

-- CAN YOU CITE SPECIFIC EXAMPLES OF WHERE THE FTC HAS BEGUN A RULEMAKING AND THE ACTIONS WERE NOT "PREVALENT"? IF SO, WHAT WERE THE EFFECTS OF THE FTC'S ACTION?

RESPONSE:

The rationale for rulemaking is that there are situations in which it is more efficient and more equitable for an agency to proceed on an industry-wide basis, rather than by undertaking individual adjudications which are costly and which may result in some firms being placed under restrictive orders while others, engaged in the same practices, labor under no such restrictions. This rationale is not served if the practices sought to be addressed by a rule are not, in fact, industry-wide. In such circumstances it is a waste of agency resources, it is ineffecient, and it is potentially inequitable to enact a rule applicable to an entire industry. The 1979 report of the Administrative Conference supports the proposition that rulemaking should be undertaken only in response to a widespread problem, and in cases where the Commission has a legal theory that supports its proposed rule. Administrative Conference of the United States, "Trade Regulation Rulemaking Proceedings of the Federal Trade Commission" (Rpt., May 1979).

Much of the concern over the rulemakings undertaken by the FTC in the 1970's is based on the fact that the Commission frequently lacked evidence sufficient to show that practices designed to be addressed by the rule were in fact common throughout an industry. For example, Timothy Muris, Professor of Law at George Mason University, and formerly director of the Commission's Bureau of Consumer Protection (as well as its Bureau of Competition), cites the funeral rule as an example of a rule that included prohibitions on various alleged misrepresentations by funeral directors that were "in most cases, supported by no more than a score of anecdotes, a finding hardly significant in an industry with nearly two million transactions a year." Muris, "Rule Without Reason: The Case Of The FTC," Regulation, September/October 1982 at 20, 22. Professor Muris makes a strong case that the Commission, while not ignoring anecdotal evidence, should not rely on it solely as a basis for rulemaking decisions; he explains that the collection of systematic projectable evidence, through the use of surveys, can frequently be cheaper to obtain and can result in more reliable information.

Dated: June 30, 1989

Senator **Bryan**. Thank you very much, Ms. McDermott.

Dr. Overbey.

STATEMENT OF DR. R. MALCOLM OVERBEY, PRESIDENT-ELECT, AMERICAN DENTAL ASSOCIATION

Dr. **Overbey**. Mr. Chairman, Senator Gorton, I am a general dentist in Memphis, Tennessee, currently serving as President-Elect of the American Dental Association. On behalf of the association's 136,000 member dentists, we applaud your efforts to reach a consensus on legislation to reauthorize the Federal Trade Commission.

We have submitted a formal statement to the committee detailing our concerns about some of the Commission's activities as they adversely affect traditional state consumer protection.

Clear statutory delineation of congressional responsibilities and the manner in which those responsibilities are to be fulfilled is necessary to resolve the confusion that now exists regarding intervention actions, rule making and state action doctrine.

Some of this confusion admittedly is related to questions of the extent of Commission authority. More prevalent, however, is the confusion and sometimes hostility resulting from the way the Commission's authority is exercised.

Specifically a reauthorization bill should establish procedures to be followed by the Commission in intervention actions while preserving its responsibilities under federal law. It should reserve to the Congress the right to review Commission trade regulation rules and the authority to disapprove rules that are inconsistent with national policy. And it should specifically recognize the applicability of the state action doctrine to the Commission's unfair methods of competition authority.

The legislation should establish a system of prompt notification of Congress when the Commission initiates an intervention action and periodic timely public notifications thereafter. It should require appropriate justification for the action and should specify that only the Commission and not its staff is authorized to make recommendations regarding legislative or regulatory actions.

Requirements of this kind we believe would resolve the confusion and disruption now created by intervention actions largely generated by Commission staff rather than the commission itself that are often unsupported by any accompanying data and sometimes without basis in law. We have provided examples of such actions in our written statement.

Because of the law enforcement authority of the Commission, such communications understandably create confusion among both state officials and professional associations as to whether these opinions represent legal advisories or only advocacy for the preferences of Commission staff in these matters.

An appropriate system of notification, congressional review, and disapproval authority over trade regulation rules and language specifically recognizing the applicability of state action doctrine to the Commission's unfair methods of competition authority will clarify the Commission's responsibilities and at the same time see to it that the authority of the states to regulate certain activities in the public interest is preserved.

I am pleased to note in conclusion, Mr. Chairman, that these issues were addressed in the legislation developed in the previous Congress. In that connection, I would also urge the committee to include another previously approved provision which would direct the Commission to conduct a comprehensive study of rate increases in property, casualty, and liability insurance.

Thank you for the opportunity to appear before you this morning, and I would be pleased to respond to any questions that you might have.

[The statement and questions and answers follow:]

STATEMENT OF DR. R. MALCOLM OVERBEY, PRESIDENT-ELECT, AMERICAN DENTAL ASSN.

Mr. Chairman, Members of the Subcommittee, I am Dr. R. Malcolm Overbey, President-elect of the American Dental Association. I am here today representing more than 136,000 member dentists.

Let me begin by commending Chairman Bryan and the Subcommittee for their initiative in conducting authorization hearings for the Federal Trade Commission. We wish you and your colleagues in the House of Representatives success in reaching a consensus on legislation to reauthorize the Federal Trade Commission Act.

The Association has, as you may know, presented testimony to Congress regarding the Commission on numerous occasions for more than 10 years. We hope those statements and the recommendations presented during this hearing will contribute to the development of legislation that enhances the effectiveness of the Commission while also reserving for the States those powers that are more properly in their jurisdiction. My comments today will focus on Commission intervention activities and rulemaking, as well as certain other related matters.

Commission Intervention Actions

With respect to the Commission's intervention program, the Association shares the concerns of the Congress -- and particularly of this Committee -- about this program and the manner in which it is being conducted, its cost, its effectiveness and its often disruptive effect upon state legislative and regulatory processes.

At the same time, I want to emphasize the Association's respect for the Commission's authority to serve the Congress, federal agencies and state and local governments. Expert comment enhances the quality of legislation and regulation, whether such comment emanates from the Commission or from others.

But in recent years, the dental profession has witnessed numerous communications from the Commission to state governors, legislators, regulatory agencies and professional associations, urging the virtual elimination of long-standing restrictions on the announcement of dental specialty qualifications; on advertising that expresses claims of superiority and testimonials to such claims; on advertising that vaguely, misleadingly, announces prices for services; on ownership of dental practices by corporations and lay persons; on the use of trade names in dental practice, and on the level of supervision required of dental auxiliaries in the provision of dental care.

These communications, largely generated by staff of the Commission and not the Commission itself, often have been unsolicited by state or local authorities, or by other interested parties. In our view, they represent merely opinions of the Commission staff, and are not positions formed through adjudicative or rulemaking proceedings. But because of the law enforcement authority of the Commission, such communications understandably create confusion among both state officials and professional associations as to whether these opinions represent legal advisories or only advocacy for the preferences of Commission staff in these matters. This confusion is compounded when the communications contain, as is often the case, specific recommendations to adopt, defeat, amend or veto legislation and regulations pending before state bodies, and when the communications are transmitted to the body in question immediately prior to the time of its scheduled action.

These interventions are especially troublesome and disruptive because they are often made without any accompanying data to support the position being advanced and because sometimes the position being advanced has no basis in law.

Let me cite two examples:

- In 1985, the Commission staff informed the North Carolina State Board of Dental Examiners that the Board's advertising regulations on announcement of dental specialty status raised "antitrust concerns." The Commission thought a general dentist who practiced only in a specialty area of dentistry should be able to use the term historically reserved for dentists who had completed two to five years of accredited post-doctoral education and training, e.g., "practice limited to oral and maxillofacial surgery." The Commission claimed that state prohibitions of this practice increased consumers' "search" costs by preventing dentists from truthfully advertising their services to the public. However, there exists a myriad of terms to permit general dentists to announce specific services without indicating that the dentist has specialist qualifications. The North Carolina

Board refused to conform its regulations to the Commission's theory. The Association believes this is the correct course because allowing indiscriminate use of specialty terms creates confusion as to who is a certified specialist. Indeed, there is considerable economic support for the proposition that the Association's system of announcement of specialty practice significantly reduces search costs because it provides information to the public regarding who is a certified specialist. The Commission has released no empirical data in dentistry that refutes the Association's conclusion. Nevertheless, it continues to the present day to urge state governments and their agencies to abandon restrictions on specialty announcement. Such action, in the guise of consumer protection, protects no one but the practitioner who wishes to represent himself as something he is not.

- Regarding adherence to law, in some of its dental interventions -- and now in the Eyeglasses II rulemaking -- the Commission has consistently taken the position that states should not prohibit the use of trade names. The United States Supreme Court, however, in _Friedman v. Rogers_, 440 U.S. 1 (1978) _explicitly upheld_ the rights of states to prohibit the use of trade names involving health care providers.

The Association recommends that provisions be included in a reauthorization bill, not unlike provisions in legislation in the last Congress, that would establish a setting in which the Commission's responsibilities for intervention under federal law are protected and its offices remain at the disposal of the Congress and appropriate federal, state and local agencies when intervention action is deemed appropriate by these bodies or members thereof.

These provisions should set requirements for prompt Congressional notification by the Commission when it initiates an intervention action. The necessity for statutory requirements in this regard, we believe, is accentuated by the Commission's failure to institute such notification procedures voluntarily, despite the clear interest of the Congress in being so notified.

Specifically, we recommend that the legislation provide:

- that, except as required by federal law, the Commission or its staff take intervention action only upon written request of a federal, state or local legislative body or agency (other than the Commission,) or an officer or member thereof;

- that the Commission and its staff be prohibited from soliciting such request;
- that the Commission be required to notify this Committee, the House Committee on Energy and Commerce, and in the case of state or local action, the members of the Congressional delegation of the state involved, as soon as an intervention action is initiated;
- that this notification detail the requesting entity, the justification for taking the intervention action, and the date or dates on which the Commission intends to respond by submitting written comment, by testifying or both;
- that only the Commission, and not its staff, be authorized to make recommendations regarding legislative or regulatory actions, and
- that the Commission be required to establish a system of periodic public notification of its initiation of intervention actions, containing the substance of its notifications to Congress, and that this system of periodic public notification be established on not less than a monthly basis.

Commission Rulemaking Activities

Both the Senate and the House versions of authorization legislation from the last Congress contain provisions for Congressional review of Commission trade regulation rules. The Association believes that similar language should be included in any future Commission authorization bills. Commission trade regulation rules have far-reaching effects and inevitably embody important policy decisions that are truly national in scope. For these reasons, it has become increasingly apparent that the Congress should reserve the right to review Commission trade regulation rules before such rules become effective. A "Disapproval of Commission Rules" provision would ensure that Commission trade regulation rules are consistent with national policy.

State Action

The Association further supports the adoption of language to eliminate the uncertainty associated with the applicability of the "State action" doctrine to the Commission's "unfair methods of competition" authority as contained in the authorization legislation of the last Congress. The Commission has demonstrated on numerous occasions that it objects to a wide range of state laws and regulations, and the public policy decisions which those controls embody. Notwithstanding this position of the Commission, we continue to believe that state governments have the authority to enact state laws and the Constitution specifically recognizes that certain rights are reserved to the States. In order to ensure that the inherent and long-standing powers of the states to regulate certain activities are preserved, we strongly recommend the adoption of language that specifically recognizes the applicability of the state action doctrine to the Commission's "unfair methods of competition" authority. In our opinion, this will ultimately save the public from bearing the tremendous costs associated with the litigation of this issue by public and private parties.

Federal Trade Commission Investigations

The Association would also urge the Committee to consider the negative impact on both the public at large and the health professions in particular that results from the manner in which certain Commission staff investigations are conducted.

Regulation of the professions has historically been recognized as the responsibility of the states. Indeed, the Supreme Court has recognized that the states are uniquely qualified to determine whether professional advertising is false and misleading in a material respect (Kentucky V. Shapero, 108 S.Ct. 1916 (1988).) The self-regulatory function of professional associations has assisted the states in this role by deterring the type of advertising that is likely to mislead consumers. However, it has been made abundantly clear in recent years that the Commission is devoting considerable resources to an ill-defined effort to determine whether state statutes, regulations and professional codes of ethics comport with the Commission's concept of acceptable regulations; a concept, we would note, that has been articulated in only the most general terms. These seemingly unending investigations have, as a consequence, had a chilling effect on the willingness of state and professional associations to zealously scrutinize deceptive advertising by professionals.

Traditionally, the states have regulated the health professions under the police power reserved to them by the Constitution. The licensure requirements of the states, for example, are designed to protect the public from unqualified practitioners. Many of their regulations are also preventive in nature. This is in accord with the basic precept of the health care practitioner to "first do no harm." However, to the extent that the Commission acts at all in regard to false and misleading advertisements, it acts after the damage has been done. Professional voluntary associations include individuals who have specialized training and experience and are in an ideal position to detect and challenge advertising practices that are deceptive and will lead to harm to the public. Because of Commission investigations that linger on for years with what appears to be minimal activity, the states and professional associations have been understandably reluctant to assume an active role in vigorously enforcing their deceptive advertising standards. Thus, in recent years, consumers have been left relatively unprotected from deceptive advertising involving professional services.

We believe that if the Federal Trade Commission Authorization Act from this Congress includes a requirement of adequate notice of intervention activity, a provision to permit Congress to disapprove Commission rules and a legislative resolution of the state action doctrine's application to the Commission's antitrust functions, the Commission's activity will be focused on matters within its expertise. This will discourage unnecessary, protracted investigations and permit the states to reassume their proper role in professional regulation.

In conclusion, I wish to express the Association's support for another provision previously included in reauthorization legislation. I refer to direction to the Commission to conduct a comprehensive study of increases in rates of property and casualty insurance, including professional liability insurance. As we have testified in the past, the dental profession has been unsuccessful in its attempts to obtain from the insurance industry data to explain escalating premiums, reduced availability of coverage, and termination of coverage for some practitioners and certain dental procedures.

We believe an appropriate study of these actions and others would provide the basis for an objective analysis of industry behavior respecting liability coverage, which is essential to the practice of the health professions. We urge that direction for such study be included in the Federal Trade Commission reauthorization legislation this year.

QUESTIONS OF SENATOR BRYAN FOR MALCOLM OVERBEY, REPRESENTING THE AMERICAN DENTAL ASSOCIATION

Question: Your testimony expressed concerns about the FTC's intervention program, and made sepcific recommendations about how that program could be improved.

-- Do you favor the provision in last year's House bill (with detailed procedures for the FTC to follow) rather than the notification to Congress required in the Senate Bill, or do you favor the Senate or another provision?

-- Some have suggested that the detailed procedures in the House bill in effect will render the FTC unable to intervene, because the procedures are so cumbersome that it will not be worth the FTC's time to comply with them. How would you respond to that criticism?

ADA Response: The recommendations made in our written testimony (p. 6-7) more closely resemble the provisions in Section 8 of the House legislation than Section 15 of the Senate bill. The Senate version did not require that the request for an FTC opinion be in writing and not be solicited by the FTC [House version, Section 8(b) and Section 8(b)(2)]. The House version also provided that only the Commissioners, not the FTC staff, make recommendations as to enactment or change of state law or regulation [Section 8(d)]. However, as a practical matter, the two versions were very similar with respect to giving the relevant Congressional committees notice as soon as the FTC determines to intervene, and providing these committees with the name of the requesting entity, the justification for the action contemplated and the date and manner of the intended intervention. [Senate version, Section 15(a)&(b), House version, Section 8(c)(1) & (c)(2)(C)].

As stated in our testimony, we recognize that the FTC has expertise which, in proper circumstances, should be made available to federal and state legislatures and agencies contemplating action within the realm of that expertise. However, we do not see how the additional provisions in the House version requiring that the request be in writing, not solicited, and in most circumstances be the recommendation of the Commission only - not the staff - makes intervention particularly cumbersome. Where recommendations are being made in the name of the FTC to change federal or state law, it seems only appropriate that the recommendations given be made with authority. In our written testimony, we made the additional recommendation that the notifications of intent to intervene given to Congress also be made available to the public, without the necessity of a request through the Freedom of Information Act. One of the problems we see with the FTC intervention activity as currently conducted is that the opinions of the FTC often arrive immediately before some decisive action is scheduled to transpire, leaving no time for discussion or analysis by interested parties. We do not believe that it would be burdensome for the FTC to make public on a timely basis a summary of the information it provides to Congress on its planned intervention activities. The FTC could easily accomplish any public notice requirement by including such items in its FTC News.

Question: You urged the Committee to consider "the negative impact...from the manner in which certain Commission staff investigations are conducted." You suggested that these FTC inquiries have the effect of discouraging state and professional associations from undertaking self-policing regulations.

-- Has this been the case in the dental profession? Are you aware of other professions where this has been a difficulty?

-- Do you suggest a specific legislative provision be included to deal with this problem? If so, what elements should that provision contain?

ADA Response: This has very definitely been the case in the dental profession. Both state dental boards and state dental associations have been hesitant to take actions which they thought were appropriate because of fear of a costly confrontation with the FTC. Very recent examples can also be found of this situation in the medical field and in accountancy. In recent testimony before the House Committee on Small Business, Subcommittee on Regulation, Richard Gannon, Executive Director of the Kansas State Board of Healing Arts, cited a case in which the State Board publicly censured two physicians for deceptive and misleading advertising of cosmetic surgery. Mr. Gannon said the Board staff then received a phone call from the FTC. Mr. Gannon testified:

"It appeared from the telephone conversation that the Federal Trade Commission was questioning the reasons the Board had publicly censured these two doctors, to insure that the Board had not in some manner illegitimately placed restraints on truthful advertising."

Both Mr. Gannon and the Chairman of the Oregon Medical Board, Dr. Hugh Johnston, testified as to the chilling effects such contacts from the FTC produced.

The Subcommittee Chairman, Rep. Ron Wyden noted that his office had received dozens of examples of misleading advertising and that state licensing boards and local medical boards have been reluctant to take action against such activity for fear of being sued for trying to limit a physician's right to advertise. In response to a statement by FTC Chairman Oliver that the FTC has made it clear that states can regulate false and deceptive advertising in local cases, Representative Wyden replied that obviously the FTC had not conveyed that message strongly enough, because the officials remained unclear about their limits.

The ill-considered nature of some of the FTC's recommendations was recently highlighted by the admonition sent to that agency by the Internal Revenue Service. For years the FTC has been urging the accounting profession to repeal its ethical prohibition against accounting firms charging their clients a contingent fee for certification of their records and reports. The accounting profession resisted this on the basis that it created a conflict of interest by giving the accounting firm a contingent interest in the report made. However, apparently when faced with the cost of extended litigation with the FTC, the accounting profession succumbed. It is our understanding that the Internal Revenue Service has requested the FTC to reconsider its position, at least to the extent of tax return preparers having a contingent interest in the taxes saved on returns they prepare. Apparently, the IRS believes that removing this ethical prohibition will encourage tax return preparers to file false federal income tax returns in the hope of participating in the illegal refunds thereby obtained.

We have not submitted specific legislative provisions that address the problems created by the FTC's interference with regulation of the professions at the state and professional association level. Efforts to draft such provisions in the past have led to allegations that the professions were seeking exemptions from the antitrust laws. This is not the case. We recognize that collusive activity among professionals leading to such acts as price fixing or illegal boycotts are prohibited by the antitrust laws. We also recognize that the United States Supreme Court has spoken on the subject of professional advertising, and that professionals have the constitutional right to advertise their fees and other accurate information concerning their services. However, the Supreme Court never stated that "puffery," which is advocated by the FTC, is constitutionally protected. Rather than trying to make these difficult distinctions through legislation at the federal level, we believe that allowing the states to resume their proper role in the regulation of the professions will go far in resolving the problem. We were impressed that many of the varied groups which appeared before your Subcommittee appeared to be speaking with one voice in stating that the FTC should return to those areas of antitrust enforcement and consumer protection which were traditionally within its expertise. The legislative provisions which we did endorse, those which would open up the FTC's intervention activity to public view and comment, and clarify application of the unfairness doctrine with respect to the FTC's antitrust jurisdiction, would naturally tend to focus the FTC's efforts on those areas where it will be meaningful and effective, and leave to the states those areas where they have demonstrated their ability.

Question: You advocated that authority should be restored to the FTC to investigate insurance. Isn't there sufficient regulation at the state level to provide the kind of information that is necessary in this area?

ADA Response: Regulation of the insurance industries by the states is complicated by the limited exemption which the business of insurance has from the antitrust laws pursuant to the McCarron-Ferguson Act. Nevertheless, States Attorneys General have attempted to cope with the problem in liability insurance through such steps as the litigation which is now ongoing in California. These actions, though costly, may eventually prove effective. We believe it would be more efficient, however, because the problem is one that crosses state lines, to also review this matter at the national level. Various FTC Commissioners have expressed an interest in doing so, and we believe it is an appropriate FTC activity.

Senator **Bryan**. Dr. Overbey, thank you very much for your testimony.

Ms. McDermott, during the course of your testimony you acknowledged the resource limitations that this commission has been confronted with over the years. Let me ask you, from your perspective on behalf of the U.S. Chamber of Commerce, what do you think the priority ought to be for the Federal Trade Commission, recognizing that it is not a perfect world and that we are not going to have all of the resources that many would like? What do you think the priority ought to be in terms of their activity?

Ms. **McDermott**. Mr. Chairman, may I respond as a private practitioner because the Chamber has not taken a position on prioritizing?

Senator **Bryan**. Please.

Ms. **McDermott**. I think this is a national consumer protection and antitrust agency, and I think it should spend most of its resources addressing problems that are national or multi-regional in scope.

Now, what does this mean? Well, one suggestion may be that in the economic intervention program, also called the competition advocacy program, is that this is an area where it could rely very heavily on the resources of the state and local agencies to take over some of the burden of advocating either in favor of the state laws that would protect consumers or preserve competition or advocating against restrictions that have been imposed for many years by state and local governments.

I think this is one area, in fact, where the state attorneys general or some of them are considering how they might cooperate with the commission in that regard.

Commissioner Strenio spoke on the subject at a symposium two weeks ago in Lawrence, Kansas, celebrating the hundredth anniversary of the first state antitrust law, and I think his thoughts on the subject were very well received.

I would suggest the commission ought to spend a significant amount of resources addressing national and multi-regional mergers and national advertising campaigns and leaving to the states to address acts and practices, whether they be deceptive or unfair practices or unfair methods of competition that primarily affect individual states and localities, and that is a fairly general response to your question.

Senator **Bryan**. It is a very thoughtful answer. You have advocated a statutory definition for unfairness, if I understood your testimony correctly.

Ms. **McDermott**. That is correct.

Senator **Bryan**. The argument, of course, for a statutory definition is that in the absence of that there will be much confusion, different standards and that sort of thing. Let me ask you either on behalf of the U.S. Chamber or your experience in private practice, can you call to our attention any areas in which that confusion or lack of uniformity has caused problems by reason of the absence of the statutory definition?

Ms. **McDermott**. I think it relates more to a remembrance of what happened before the statement was issued, and I can just give you a couple of examples.

Senator BRYAN. Please.

Ms. McDERMOTT. There were a series of advertising cases brought in, I believe, the late seventies, maybe mid-seventies where practices were condemned on the basis that they created what is called unfair imitative behavior. To a practitioner this is very difficult to understand.

You can review an advertisement and you can assure yourself that there is no deception in there, but the gist of these theories was that it is unfair to run an ad that might cause—I mean in this case there was a real problem—small children to imitate the actions taken in the ad, and they might hurt themselves. This seemed to be stretching the unfairness concept considerably.

The FTC came out with the unfairness statement, not so much to address those cases, but to explain how it viewed unfairness and how it viewed unfairness as differing from deception since the two terms are contained side by side in the FTC Act. And that definition has since been applied in at least one case, the International Harvester case, and I think the ABA report took the position that further case development would solve the problems of an otherwise possibly temporary policy statement.

However, you take your cases as you find them, and there might not be an opportunity for many years to continue to flesh out that definition in the case law and so in the meantime, we think that it having been applied successfully in at least one major decision and having been accepted by the commission for about eight years now, that it might as well be codified and that it would be a useful contribution to commission jurisprudence.

Senator BRYAN. Thank you.

Mr. Silbergeld, you have been critical of the performance of the commission in a number of areas, its lack of focus. Tell us where you think the strengths of the commission have been, if you find any strengths, and what are the areas that we need to get them to improve.

Mr. SILBERGELD. The strength of the commission lies in its long tradition, which I think has not—we are not too far away from in terms of its being an active law enforcement agency to have forgotten yet in a core of very capable career staff and in some commissioners who very strongly believe that the agency not only has an important statutory mission, but that it has not been fulfilling that mission over the past few years.

I can only repeat what has been quoted in public many times, former Commissioner Bailey's statement before she retired from the Commission that the state attorneys general had become the primary enforcers of the Federal Trade Commission Act. That is a weakness, and that comes from a commissioner who is not very far to either side of the center of the economic spectrum.

Where it ought to go is to get back to pragmatic economics, number one, and to a devotion of the leadership, and I am talking very specifically about the chairperson, to the statutory mission of the agency and to a very practical economic view of the world rather than to an ideological devotion to that great cathedral in the sky, the University of Chicago's School of Economics.

My organization does not comment on nominations, processes or nominees, but I think that this committee could do very little that would help the consumer more than to assure that the next chairperson of the Federal Trade Commission has a very practical view of economics that is based upon pragmatic analysis of facts and a belief that there are, in fact, many market imperfections which the commission may encounter from time to time rather than a view that markets are more or less perfect and that the commission will very seldom find market imperfections or high barriers to competition in competition cases.

And I think a major shift in that view from the chairperson because—especially because the chairperson appoints the chiefs of the operating bureaus is the most important thing that can happen down there.

Senator BRYAN. Thank you very much, Mr. Silbergeld.

Senator Gorton.

Senator GORTON. I want to go back to this debate over unfairness and make sure that I understand your respective positions.

Ms. McDermott, is it the position, your position and that of the Chamber of Commerce that the 1980 policy statement of the FTC should be codified?

Ms. McDERMOTT. Well, we support—not in toto—it is very long—but we did support the language in S. 677 which essentially codified that language.

Senator GORTON. Which essentially codified that language?

Ms. McDERMOTT. Right.

Senator GORTON. Mr. Silbergeld, it is your view that we should let well enough alone and that that policy statement should remain a policy statement, but that there should be no attempt to codify it?

Mr. SILBERGELD. Certainly at this point with its having very limited number of applications, if the commission were to engage, Senator Gorton, in a course of litigation or rule making under that doctrine and we were to find either that it works so well and there is such general agreement on what could be codification language that it should be made permanent or that it requires some adjustment because the commission's view and the Congress' view of details of the unfairness doctrine need to be brought to together, then I would say that there may be a time down the road. But right now I would leave it where it is.

Senator GORTON. I understand that last line, but you would leave it where it is because you agree with it? Does it state an appropriate policy?

Mr. SILBERGELD. I believe that it does, yes.

Senator GORTON. Your organizations do not seek to change that basic policy statement?

Mr. SILBERGELD. No.

Senator GORTON. So, your view is that we ought to leave it as it is, where it is, primarily because it would be easier to change if certain circumstances would change at some future time. But you do not seek any change now?

Mr. SILBERGELD. We seek no specific changes in the statement of the policy.

Senator GORTON. And I take it, Ms. McDermott, you fear that there would be some such changes, and you would like it cemented in the law?

Ms. McDERMOTT. Either changes or that it could be called into question if it were not codified.

Senator GORTON. Perhaps—I think I will start with Mr. Silbergeld on this. You sat through Attorney General Abrams' discussion of the role of the attorney generals. What is your general reaction to that?

I know you have been complimentary of the way in which attorneys general have gone. Would you like a follow-up with a more formal arrangement like that in some of the law enforcement areas which he has described was entered into between the state attorneys general or among, perhaps, the state attorneys general and the Attorney General of the United States and the Federal Trade Commission? Do you think that would help?

Mr. SILBERGELD. I think that would be useful, Senator Gorton. One of the benefits of actually formalizing that would be to bring the leadership of the commission and the leadership of the state AGs closer together. I do not think that the lack of an agreement of that sort is the reason that there has been at times open warfare. I think it has more to do with differing views of the statutory mission. But I think that that would help to reduce that by creating a forum in which differences could be resolved in a more friendly fashion.

Senator GORTON. And finally for you, you have recommended that the FTC be authorized even before a debate on McCarran-Ferguson to study the insurance agencies. I think I am correct that your organizations also want McCarran-Ferguson either to be repealed or modified?

Mr. SILBERGELD. That is correct.

Senator GORTON. What is lacking with respect to data on the insurance industry which such a study might discover? Have there not been so many studies that we could not possibly look at them all by one federal, state or private entity or another?

Mr. SILBERGELD. Well, let me answer in two parts, and one of them is that until you actually sit down and plan some studies, you do not always know what is lacking. By way of comparison I constantly get from members of the press inquiries what cases would the commission have brought if it were more active in national advertising. I do not know. Until you decide to do it, you do not know what you are going to choose to look at.

Some preliminary screening is necessary to answer that question better, but I think the answer is no, there is a lot of data that is either missing or it would be better accepted and more complete if it were done anew or perhaps differently by the Bureau of Economics and perhaps the Bureau of Economics and the Bureau of Competition working together.

Senator GORTON. And if there is no increased appropriation in the next year or two for the Federal Trade Commission, what would you have it drop in order to conduct a thorough insurance study?

Mr. SILBERGELD. I do not know that I am asking you to conduct a comprehensive study of the industry as such. I think what it should appropriately do is select specific issues, perhaps differences in urban/rural auto rates or problems specific to Medigap, narrow issues, and study those.

I think the commissioners themselves will have to set some priorities as to what is the best thing to drop. But I think that the authority needs to be there in order for them to even begin to think about that.

Senator GORTON. Thank you, members of the panel. Thank you, Mr. Chairman.

Senator BRYAN. Senator Gorton, thank you very much, and to each member of the panel, thank you very much for your testimony and your response to our questions. If there are additional questions from members of the subcommittee, we would appreciate an answer to those as well.

Thank you again.

And our final panel this morning consists of Mr. H. Martyn Owen, attorney at law, Shipman and Goodwin, accompanied by Mr. Steven Easter, Vice President, Government Relations and a member for Blue Diamond Growers, representing the National Council of Farmer Cooperatives, and Mr. Donald A. Randall, Executive Vice President and General Counsel of the National Independent Dairy Foods Association.

Gentlemen, good morning, and welcome to the subcommittee's hearing. We will be begin by hearing from Mr. Owen.

STATEMENT OF H. MARTYN OWEN, COUNSEL, NATIONAL COUNCIL OF FARMER COOPERATIVES, ACCOMPANIED BY STEVEN EASTER, VICE PRESIDENT, GOVERNMENT RELATIONS AND MEMBER FOR BLUE DIAMOND GROWERS

Mr. OWEN. Thank you very much, Mr. Chairman, Senator Gorton.

My name is H. Martyn Owen. I am a partner in the law firm of Shipman and Goodwin in Hartford, Connecticut, and counsel to Agri-Mark, Inc., a dairy cooperative headquartered in Lawrence, Massachusetts. I currently serve as Chairman of the Antitrust Subcommittee of the National Council of Farmer Cooperatives.

With me today is Steven W. Easter, Vice President-Member and Government Relations, of Blue Diamond Growers, an almond marketing cooperative headquartered in Sacramento, California.

Our purpose in being here today is to attempt to assist you in further clarifying the roles of the Federal Trade Commission and the Department of Agriculture concerning their respective jurisdictions over the activities of farmer cooperatives and the administration of marketing orders.

The National Council of Farmer Cooperatives favors permanent adoption of the restrictions placed on the Federal Trade Commission by the FTC Improvements Act of 1980 and subsequent continuing resolutions or annual appropriations bills.

These have provided that the commission shall not have any authority to conduct any study, investigation or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Capper-Volstead Act, is not a violation of the antitrust laws or the Federal Trade Commission Act, and that the commission shall not have any authority to conduct any study or any investigation of any agricultural marketing orders.

The reasons for these restrictions have been outlined in the past, and they are equally compelling today. They implement a congressional mandate, they assure adherence to congressional policy.

They do this in two ways. First, by requiring that the FTC recognize and take into account those activities of cooperatives which are protected by the Capper-Volstead Act before initiating action involving them. Second, by indicating that marketing orders are, as a matter of congressional policy the responsibility of the Secretary of Agriculture.

These restrictions are necessary because the Federal Trade Commission has in the past ignored congressional mandates. Our written testimony provides examples of needless and costly regulatory actions.

These protections have remained in effect continuously since passage of the Improvements Act under the terms of subsequent continuing resolutions or annual appropriations bills covering the Federal Trade Commission.

During this time there has been no evidence that activities of cooperatives have adversely affected the prices paid for food by consumers.

In fact, the farmers' share of the consumers' food dollar in many areas has declined.

Since cooperatives are already fully regulated by the Secretary of Agriculture and the Department of Justice, there is no reason for the Federal Trade Commission to have this authority.

The prohibitions we support will provide the necessary guidance to future commissions to prevent repetition of past FTC abuses of authority. Thank you.

[The statement and questions and answers follow:]

STATEMENT OF NATIONAL COUNCIL OF FARMER COOPERATIVES

Mr. Chairman and members of the Subcommittee. This statement is submitted on behalf of the National Council of Farmer Cooperatives.

The National Council is a nationwide association of cooperative businesses which are owned and controlled by farmers. Its membership includes 100 major agricultural marketing, supply and credit cooperatives and 32 state councils of farmer cooperatives. National Council members handle practically every type of agricultural commodity produced in the U.S., market domestically and around the world, and furnish production supplies and credit to their farmer members and patrons. Two-thirds of U.S. farmers are affiliated with one or more cooperatives. The National Council represents about 90 percent of the more than 5,100 farmer cooperatives in the nation, with a combined membership of nearly 2 million farmers.

My name is H. Martyn Owen. I am a partner in the law firm of Shipman and Goodwin in Hartford, Connecticut and counsel to Agri-Mark, Inc., a dairy cooperative headquartered in Lawrence, Massachusetts. With me today is Steven W. Easter, Vice President - Member and Government Relations of Blue Diamond Growers, an almond marketing cooperative headquartered in Sacramento, California. The events discussed in our testimony are offered as background, so that you will better understand our concerns. Our purpose in being here today is to attempt to assist you in further clarifying the roles of the Federal Trade Commission and the Department of Agriculture concerning their respective jurisdictions over the activities of farmer cooperatives and the administration of marketing orders.

As you know Congress reaffirmed the primary jurisdiction of the Secretary of Agriculture over farmer cooperatives and marketing orders by providing in the FTC Improvements Act of 1980 that the Commission should not use any funds for the purpose of conducting any study, investigation or prosecution of any agricultural cooperative for conduct which, because of the provisions of the Capper-Volstead Act, is not a violation of any federal antitrust act or the Federal Trade Commission Act, or for the purpose of studying or investigating any marketing orders. These prohibitions are currently in effect under the terms of the Commerce, Justice, State and Judiciary appropriations bill for fiscal year 1989.

CAPPER-VOLSTEAD

Section 1 of the Capper-Volstead Act provides that producers of agricultural products may act together in corporate or non-corporate associations, operated for the mutual benefit of the member producers in collectively processing, preparing for market, handling, and marketing their products. It also authorizes them to have marketing agencies in common and to make the necessary contracts and agreements to effect such purposes.

The principal reasons for enactment of Capper-Volstead in 1922 are equally compelling today. They include the following:

* Each of the nearly 2 million farmers in the United States acts independently and makes major financial commitments to production long before market demand is known.
* Farmers face far greater production risks than other businessmen because of weather, disease, and other disasters.
* Once farmers decide on production strategies they cannot easily change without incurring major financial loses. Unlike other businesses, farmers cannot shift production in midstream because of changes in market demand.
* Most farm products are perishable and cannot be stored indefinitely. Therefore, farmers must sell their production within a relatively short period of time, regardless of market prices.
* Capital invested in agricultural production cannot easily be transferred. This is true for crops, as well as livestock and dairy production.
* Farmers marketing their products individually lack bargaining power in the marketplace. There are relatively few buyers who process and distribute raw agricultural commodities.

Section 2 of the Act grants specific authority to the Secretary of Agriculture to guard against possible abuses of Capper-Volstead by requiring the issuance of a complaint if the Secretary has reason to believe that any association monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced. The Secretary is authorized to issue a cease and desist order against the association.

Since the enactment of Capper-Volstead, the Secretary of Agriculture has investigated a number of undue price enhancement charges against cooperatives including an extensive investigation of alleged overpricing of milk. After thorough investigation and study of the entire dairy industry by various agencies within USDA, it was concluded that no undue price enhancement had occurred.

It is important to remember that this scrutiny of cooperatives is not confined to the Secretary but is also shared by the Department of Justice. Capper-Volstead grants only limited antitrust immunity. Once a cooperative is formed, it is limited in its business activities in much the same way as non-cooperatives. For example, the courts have held that:

1. Capper-Volstead exemption may be lost if a cooperative includes persons who are not agricultural producers.

2. Cooperatives that combine or conspire with non-cooperatives or persons other than producers to monopolize or restrain trade are subject to the antitrust laws.
3. Cooperatives that engage in predatory conduct in order to restrain trade or monopolize or attempt to monopolize are subject to action under sections 1 and 2 of the Sherman Act even though price is not unduly enhanced.
4. Cooperatives cannot control the resale prices of customers.

Clearly, these limitations indicate that effective enforcement of the antitrust laws as they apply to agricultural cooperatives is being carried out by the Courts, the Department of Agriculture and the Justice Department. An additional layer of FTC or other regulation is simply unnecessary and burdensome.

MARKETING ORDERS

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. Sec. 601 et. seq. authorizes the Secretary of Agriculture to enter into marketing agreements with handlers or to issue marketing orders regulating the handling of milk and other agricultural commodities in interstate commerce. The objective of the statute is to effect an orderly flow of commodities in order to protect the interests of consumers as well as farmers under the direct regulatory control of the Secretary of Agriculture.

Marketing orders relating to milk provide a regulatory mechanism for defining a regulated marketing area, for classifying milk in accordance with its end use, and for establishing minimum prices which each handler must pay for each "use classification" disposed of in the regulated area.

Marketing orders relating to commodities other than milk (fruits and vegetables, principally) provide a regulatory mechanism which may:

(a) govern the rate of flow of the regulated commodity to market;

(b) create reserve pools to manage and equitably apportion surplus among producers and handlers;

(c) control the grade, size and quality of the commodity that may be marketed;

(d) provide a system for inspecting commodities and establishing standards of size, weight and pack;

(e) provide for research and development to improve or promote the marketing, distribution and consumption of the commodity;

(f) provide for product advertising.

Section 8b of the Act provides that marketing agreements entered into between the Secretary of Agriculture and handlers (or orders issued by the Secretary) are exempt from the antitrust laws. This exemption is based in large part on recognition of the Secretary's responsibility for balancing the public interest among producers, handlers, and consumers. Changes in marketing orders are made on the record following full notice to interested parties and the opportunity to be heard. The Food Security Act of 1985 and the Food Security Improvements Act of 1986 both contain changes designed to improve the operation of the federal marketing order programs.

COOPERATIVES AND THE FEDERAL TRADE COMMISSION

Cooperatives sought restrictions on the use of funds in the FTC Improvements Act of 1980 because during the early 1970's the Commission ignored the provisions of the Capper-Volstead Act and the Agricultural Marketing Agreement Act by proceeding against cooperatives and marketing orders. The costs to cooperatives, and indeed to the government, as a result of these intrusions into the jurisdiction of the Secretary of Agriculture were substantial.

In the mid-1970's, as part of a study into the role of agricultural cooperatives in the economy, the Commission requested vast amounts of information from the 60 largest cooperatives. During the same period, the Commission instituted investigations of several agricultural cooperatives. These investigations were expensive and time consuming for the cooperatives involved. For example:

* A Northeast dairy cooperative spent nearly 50,000 man hours at 42 separate locations in order to collect the 29,000 documents requested in a subpoena.
* An investigation of a Northeast marketing cooperative lasted for nearly 10 years without a complaint ever being issued.
* A West Coast marketing cooperative that attempted to challenge FTC's jurisdiction in the courts finally entered into a consent decree when it faced legal fees mounting to nearly $1 million per year.

Each of the cooperatives mentioned in the examples is organized and operated in accordance with the requirements of the Capper-Volstead Act. Yet to our knowledge the Commission never inquired nor made a specific ruling as to whether the Capper-Volstead Act provided immunity prior to initiating the studies or issuing complaints.

These activities provided the backdrop for the efforts by cooperatives to convince Congress to restrain the FTC from interfering with the rights conferred by Capper-Volstead and with marketing orders and culminated in passage of the FTC Improvements Act of 1980.

The Conference Report accompanying the Improvements Act stated the conferees' desire to ratify the spirit and intent of the Capper-Volstead Act, and their belief that the rationale for the limited antitrust exemption contained in the statute is valid.

The Conference Report clearly indicates that the protections afforded cooperatives by the Capper-Volstead Act are legitimate and necessary, and that the FTC should not impose additional layers of authority in an area where the Secretary of Agriculture and the Department of Justice already have primary jurisdiction to prohibit illegal conduct.

LEGISLATIVE HISTORY

Capper-Volstead is remedial legislation designed to protect farmers who choose to market their crops through cooperative associations from being prosecuted for conduct that would otherwise be regarded as a violation of the antitrust laws.

The legislative history brings into sharp focus the fact that Congress specifically considered the question of whether to place Section 2 authority with the Secretary of Agriculture or in the Federal Trade Commission. When the measure which passed the House of Representatives reached the Senate floor, an attempt was made to substitute the words "Federal Trade Commission" for the words "Secretary of Agriculture", and the floor debates contain pointed arguments in support of both versions. When the vote was taken, the Senate affirmed the House version and refused to place the authority in the FTC.

Because Capper-Volstead was remedial legislation its purpose was to grant antitrust relief to farmers who were threatened with antitrust prosecutions. Congress was not seeking to add a third government agency to supplement existing authority of the Department of Justice and the FTC. Instead it was seeking to immunize and protect farmers from antitrust prosecution for conduct falling within the scope of Capper-Volstead. It deliberately chose the Department of Agriculture to guard against abuse of the exemption, not the FTC.

The FTC Improvements Act reaffirmed this Congressional intent and clearly limited the role of the Commission with regard to agricultural cooperatives. Without this provision, cooperatives have little if any protection from FTC harassment if the Commission decides to proceed without a meaningful determination as to whether Capper-Volstead affords immunity. For this reason the National Council supports adoption of permanent language in the Federal Trade Commission Act that would prevent the Commission from studying, investigating or prosecuting any agricultural cooperative for acts or transactions that fall within the scope of the Capper-Volstead Act.

We also urge you to retain the prohibitions against FTC study or investigation of marketing orders. FTC involvement in this area would be duplicative and costly. Responsibility for oversight and enforcement of marketing orders rests with the Secretary of Agriculture under the provisions of the Agricultural Marketing Agreement Act of 1937.

The Department of Agriculture has the necessary expertise and trained personnel to monitor and enforce these marketing order programs. There is no need for the FTC to expend funds to duplicate these efforts. In addition, the House and Senate Agriculture Committees regularly review the marketing order program as part of their oversight responsibilities.

CONCLUSION

Mr. Chairman, the exemptions from antitrust laws given to farmers and their cooperatives are limited, carefully drawn exemptions regulated by the Secretary of Agriculture, and narrowly construed by the courts to achieve only their intended purposes. Looking at the experience since passage of the Improvements Act, the Secretary of Agriculture has continued to effectively regulate both the Capper-Volstead Act and marketing orders. During that time, consumer prices have not been unduly affected.

Cooperatives help bridge the gap between the farm gate and the consumer's table. They bring efficiency to the system, and their existence in the marketplace encourages others to be efficient in order to compete. In this way they serve both the producer and consumer well.

The FTC has no compelling reason to try to impose itself in an area which is already extensively regulated. The public is protected under present law. The protection is balanced. The only result would be to weaken cooperatives to the detriment of farmers as well as consumers.

National
Council of
Farmer
Cooperatives

June 28, 1989

The Honorable Richard H. Bryan
United States Senate
Washington, D.C. 20510

Dear Senator Bryan:

The following information is furnished in response to your questions concerning the jurisdiction of the Federal Trade Commission over agricultural cooperatives. Consistent with your request I will state both your question and my answer to it in each case.

Q: You testified in favor of limiting the FTC's authority over agricultural cooperatives, because you believe that the secretary of agriculture and the Justice Department have sufficient authority to deal with improper actions in this area. The National Independent Dairy-Foods Association suggested that the Departments are reluctant to exercise their authority in this matter.

--How would you respond to that criticism?

--Can you cite recent examples where the agriculture or justice departments have curbed improper actions by agricultural cooperatives?

A: I know of no reluctance on the part of the Departments of Agriculture or Justice to exercise their authority over agricultural cooperatives. The Capper-Volstead Act offers limited immunity from the antitrust laws. That immunity allows farmers to join together to market their products, permits

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farmer cooperatives to have marketing agencies in common, and allows farmers and cooperatives to enter into agreements to effect such purposes.

We seek to restrict the authority of the FTC to study, investigate and prosecute only that conduct which is protected by the limited immunity. The Commission will have, as it does now, jurisdiction to investigate and issue a cease-and-desist order, if appropriate, for anticompetitive conduct which is outside the scope of the limited immunity.

The Secretary of Agriculture has authority under the Capper-Volstead Act to issue a cease-and-desist order upon any cooperative which has monopolized or restrained trade to such an extent that the price of any agricultural product has been unduly enhanced. In the mid 1970's, the Department of Agriculture undertook an extensive study of over-order pricing in the dairy industry. The conclusion of that study was that no undue price enhancement had occurred. Since that time, including the period when FTC Chairman Oliver served as USDA's General Counsel, I am not aware that there have been any undue price enhancement investigations. This should not be surprising given the economic depression which has occurred in agriculture during recent years. I am convinced that USDA's inactivity in this area is not due to reluctance to investigate, but rather to the fact that there have been no complaints nor evidence of undue price enhancement that would warrant investigation.

In support of this contention, I would note that during the period from 1980 to 1989, the blend price for milk (the price the dairy farmer receives) under the Federal Milk Marketing Order for New England has fallen 3%, while the retail price for milk in the store has risen 19%. This is but one illustration of the general experience of the American farmer since 1980 receiving both a falling share of the consumer's food dollar and a net lower price for his product, without even including the effects of inflation.

Except for the limited protection afforded by the Capper-Volstead Act, the Justice Department's authority over agricultural cooperatives is the same as its authority over non-cooperative businesses. The Department has a long tradition of exercising its authority in connection with anticompetitive practices of cooperatives, beginning with United States v. Borden, 308 U.S. 188 (1939) and continuing with Maryland & Virginia Milk Producers Assn. v. United States, 362 U.S. 458 (1960), United States v. Associated Milk Producers, Inc., 1974-2 Trade Cases (CCH) ¶75,184 (W.D.Mo. 1974), United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cases (CCH) ¶61,509 (W.D.Mo. 1977) and United States v. Dairymen, Inc., 1978-1 Trade Cases (CCH) ¶62,053 (D.Ky.) 1978), aff'd in part, rev'd in part, 660 F.2d 192 (6th Cir. 1981). More recent examples include United States v. Agri-Mark, Inc. et al., 1981-1 Trade Cases (CCH) ¶63,967 (D.Vt. 1981) and United States v. Rice Growers Assn. of California, et al., 1986-2 Trade Cases (CCH) ¶67,314 (E.D.Cal. 1986).

Current enforcement activities of the Justice Department reflect no more reluctance to exercise its authority than may be attributed to the regulatory philosophy of all administrative agencies of the federal government (including the Federal Trade Commission) during the past eight years: that the public is better served by less government interference in the marketplace.

Q: Could you explain why it is more desirable to have a victim of an agricultural cooperative's anticompetitive practices pursue a private lawsuit under the Clayton Act, as opposed to giving the FTC the authority to investigate and issue a cease-and-desist order if appropriate?

A: I do not believe it is any more desirable to have a victim of anticompetitive practices pursue a private lawsuit than to give the FTC authority to investigate and issue a cease-and-desist order, if appropriate. The question implies that under the legislative restrictions we support a victim of agricultural cooperatives' anticompetitive practices would have to seek recourse by private action without the possibility of action by the FTC. Such legislative restrictions will not produce that result.

If conduct of an agricultural cooperative is protected by the Capper-Volstead Act, a private party will not be able to obtain recovery against it, Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, 413 F.Supp. 984 (N.D.Cal. 1976), aff'd 580 F.2d 369 (9th Cir. 1978) (per curiam), cert. denied, 439 U.S. 1090

(1979); and neither will the Federal Trade Commission have grounds for the issuance of a cease-and-desist order. Central California Lettuce Producers Cooperative, 1977 Trade Reg. Rept. (CCH) ¶21,337 (FTC). The limitation on the Commission's authority set forth in the proposed legislation is simply designed to preclude Commission activities which do not respect the Congressional policy established in the Capper-Volstead Act.

Conversely, it is clear that the restrictions that we advocate will neither hinder nor prevent the Federal Trade Commission from investigating and challenging activity which is not protected by the Capper-Volstead Act. Dairymen, Inc. v. FTC, 684 F.2d 376 (6th Cir. 1982), cert. denied 462 U.S. 1106 (1983). Moreover, the FTC does not appear to have been constrained in its efforts to monitor cooperative activity. As recently as February, 1988, the Commission's New York Regional Office conducted a non-public investigation to determine whether Regional Cooperative Marketing Agency, Inc., a marketing agency comprising dairy cooperatives and individual dairy farmers in the Northeast, had engaged in anticompetitive acts or practices to fix the price of milk in violation of Section 5 of the Federal Trade Commission Act. The investigation concluded that no action be undertaken by the Commission.

Thank you for the opportunity to assist your Subcommittee in its efforts in connection with the reauthorization of the Federal Trade Commission.

Sincerely,

H. Martyn Owen

H. Martyn Owen

HMO:dcl
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Senator BRYAN. Thank you very much, Mr. Owen.

We will now hear from Mr. Randall.

STATEMENT OF DONALD A. RANDALL, EXECUTIVE VICE PRESIDENT, GENERAL COUNSEL, NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION, ACCOMPANIED BY HARRY G. SHUPE, COUNSEL

Mr. RANDALL. Thank you, Mr. Chairman, and Senator Gorton. I am accompanied today by Mr. Harry G. Shupe, counsel for the association here in Washington.

The National Independent Dairy-Foods Association, NIDA, is an association of independent proprietary dairy processors, manufacturers, and distributors of fluid milk and a variety of cheese and other dairy products. Many of NIDA's members are small businesses, and some began as dairy producers. Most of our members are regulated handlers under the Federal Milk Marketing orders. NIDA has no dairy cooperative members. NIDA members have an interest in common with thousands of small business dairy farmers and some of the local cooperatives or bargaining associations.

The future role of the Federal Trade Commission is of vital concern to the proprietary dairies and to most dairy farmers. The FTC has prudently and cautiously used its resources to defend the basic free enterprise system in our agriculture, and it has tried to preserve competition and to defend the small businessmen.

The tired old arguments of those who oppose any FTC involvement in agriculture are always based on two false premises. One, farmers, including dairy producers, are too small and too fragmented as economic units to handle the competition of the free marketplace, and therefore, must have unrestricted ability to form cartels or trade restraining federations free of the antitrust laws and, in general, paying little or no taxes. And the second one is that since agriculture is only understood by the Secretary of Agriculture, and since only the Secretary can appreciate the monopoly price fixing needs of farmers, only the Secretary needs to exercise antitrust authority in agriculture.

The realities of agriculture show the falsity of these arguments. All farmers are not weak, fragmented units. Many farmers are multiple, six-figure operations, and the cooperatives are multi-billion, and in many instances and in most instances, multi-million corporations organized as non-tax paying cooperatives.

The realism of agriculture in the 1990s belies the myth that only the Secretary of Agriculture understands and protects the interests of the farmers. The further truth of the 1990s is that the Secretary of Agriculture for years has presided over an industry marked by the decline of the family farmer.

NIDA submits that legislation authorizing the FTC should contain no special section on agriculture, nor agricultural cooperatives. The FTC shares with the attorney general the authority to enforce the antitrust and trade regulation laws in agriculture where actions are not immunized, but the FTC has a right to determine that jurisdiction.

My complete statement, Senator, carries several references to antitrust actions by state attorneys general. One of the most recent ones is in the State of Utah where the attorney general has brought action against a cooperative for price fixing, for allocating markets, and for many other things. That case was brought to the attention of the Federal Trade Commission several years ago by our organization. Had the FTC moved, that group of dairy producers out there would not be facing the enormous cost of litigation in the state courts and probably would have saved themselves a great deal of money.

We hope you will carry the full statement as it is. And I would like to conclude by saying this committee has a very unique opportunity to address the problems associated with free enterprise and marketing in agricultural products, because in 50 years, the Secretary, with all of his knowledge and expertise of marketing orders and other things that regulate these cooperatives, has never brought an over-order pricing section to case, in the face of repeated antitrust cases brought both privately and by the state attorneys general throughout the United States. It has never been done before. The Ag Committee will not do it. They do not have a will to do it. They do not have a mission to do it. The Secretary does not have a mission to do it. You have that opportunity here with the Federal Trade Commission to impose oversight on their activities in a way that can protect the American people.

Thank you.

[The statement and questions and answers follow:]

NATIONAL
INDEPENDENT
DAIRY-FOODS
ASSOCIATION
SINCE 1957

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STATEMENT OF THE
NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION
ON THE AUTHORIZATION OF THE FEDERAL TRADE COMMISSION (FTC)
BEFORE THE
SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
CONSUMER SUBCOMMITTEE

June 8, 1989

TESTIMONY
OF
DONALD A. RANDALL, EXECUTIVE VICE-PRESIDENT/GENERAL COUNSEL

I. INTRODUCTION

The National Independent Dairy-Foods Association (NIDA) is an association of independent proprietary dairy processors, manufacturers and distributors of fluid milk and a variety of cheese and other dairy products. Many of NIDA members are small businesses and some began as dairy producers. Most of our members are regulated handlers under federal milk marketing orders. NIDA has no dairy cooperatives as members. NIDA members purchase milk directly from independent dairy farmers or from producer cooperatives. Some of these cooperatives are local or county-wide bargaining associations. Other cooperatives supplying NIDA's members are state-wide or multi-state regional producer associations or federations. Some of these associations have their own tank truck lines, storage tanks, processing and manufacturing plants and their own wholesale and retail distribution-sales systems.

NIDA members have interests in common with thousands of small business dairy farmers and some of the local cooperatives or bargaining associations. These common interests span the gamut of small businesses whether sole proprietorships, partnerships or family corporations. It is clear that the survival of independent dairy farmers, as in the case of independent proprietary dairies, depends substantially on congressional policies and the administration of laws and regulations affecting the production, handling and consumption of milk and dairy products.

The future role of the Federal Trade Commission (FTC) is of vital concern to proprietary dairies and to most dairy farmers. The FTC, if allowed to function according to the mandates of its charter and the additional antitrust and trade restraint laws and rules, can provide an invaluable service to the dairy industry. In the past, when the FTC has acted in any area of agriculture, without being fettered by partisan politics, it has assisted industry members and not disrupted nor harmed any producer association or proprietary company.

If anyone without prejudice examines the record of the FTC in agriculture, particularly in dairy, the following conclusions would be clear:

1. FTC orders affecting the structure of the industry have been rational and logical.

2. The FTC has applied the same procedures to agriculture industry participants as applied to all other corporate or non-corporate non-food industry members.

3. The FTC has not caused undue economic hardship for any agriculture member.

4. Certain large producer associations have made self-serving and unsubstantiated claims of FTC harassment and large defensive costs, but these were the result of their own mistakes and tactics.

5. The FTC has prudently and cautiously used its resources to defend the basic free enterprise system in agriculture and it has tried to preserve competition and to defend the small businessman.

The tired old arguments of those who oppose any FTC involvement in agriculture are always based on two false premises:

1. Farmers, including dairy producers, are too small and too fragmented as economic units to handle the competition of the free market place, and therefore must have the unrestricted ability to form cartels or trade restraining federations; and

2. Since agriculture is only understood by the Secretary of Agriculture and since only the Secretary can appreciate the monopoly price fixing needs of farmers, only the Secretary needs to exercise antitrust authority in agriculture.

The realities of agriculture show the falsity of these arguments.

All farmers are not weak fragmented economic units. Many farmers are multiple six figure and seven figure businesses organized as family corporations and partnerships. Much of agriculture, in particular dairy, is heavily regulated by federal and state orders and regulations. Most of the nation's milk supply is intensely regulated under federal milk marketing orders. These orders regulate every aspect of handling and pricing of milk and dairy products. The supplies of milk are regulated and the plants receiving the milk are regulated. These regulations are enforced by sanctions and monetary penalties. Producer settlement funds, security funds and bonds are part of the regulations to protect dairy farmers. Farmers are guaranteed minimum prices and the security of payments. The Agricultural Marketing Act carries its own antitrust exemption.

It must be concluded that by the sheer size of the largest and most productive ten percent (10%) of all farmers and by the size and power of their lawfully-organized associations and by the myriad of regulations, farmers are not too weak to compete in free markets. The realism of agriculture in the 1990's belies the myths that only the Secretary of Agriculture understands and protects the interests of farmers. The further truth of the 1990's is that the Secretary of Agriculture for years has presided over an industry marked by the decline of the family farmer.

II. FTC'S ROLE IN ANTITRUST TRADE REGULATION AND COMPETITION IN AGRICULTURE

NIDA submits that the next legislation authorizing the FTC should contain no special section on agriculture nor agricultural cooperatives. The Capper-Volstead Act (7 USC 291) protects the formation and operation of agricultural cooperatives and common marketing agencies. It does not need to be restated nor used to limit or clarify FTC authority. The FTC's jurisdiction has always been clear and it has never been enlarged by FTC's own interpretation. The FTC has no authority to enforce the Capper-Volstead Act, and it has never had authority to apply the FTC Act nor any antitrust statute in contravention of the basic authority of Capper-Volstead. The FTC shares with the Attorney-General the authority to enforce antitrust and trade regulation laws in agriculture where actions are not immunized, but FTC has the right to determine its own jurisdiction.

The FTC should have the right to study the economic facts of marketing orders. Are they functioning as they were intended? Are they anticompetitive and anticonsumer? Do they assist farmers and consumers and stabilize markets?

The restriction on the FTC, which appeared in S. 677 (the FTC authorization bill from the 100th Congress), from using any funds for the purpose of conducting any study or investigation of any agricultural marketing order was, in part, motivated by the unofficial 1975 FTC staff study by a group of attorneys and economists in the FTC's Bureau of Competition. The study was informative. This restriction on FTC studies is a disservice to the Congress and the American people. It has no justifiable place in the FTC appropriations nor authorizations.

We frequently hear from members of Congress that they do not understand agricultural marketing orders. Every few years when Congress is debating the dairy provisions of an omnibus agriculture bill, we hear the same complaints from Members of Congress' staffs: "Please do not prepare papers on, or try to discuss, the federal milk marketing order system. It is just too complicated and we do not have time to understand it."

On the other hand, some Members of Congress, people in the dairy industry, and consumer organizations ask another question: "Why do we always have to defer to the Secretary of Agriculture on any issue concerning the effects of Federal marketing orders? The Secretary of Agriculture has an institutional bias as the chief official who writes them, issues them, promotes them, and presides over a bureaucracy which enforces them." During the last floor debate, Senator Boschwitz, in support of his amendment to remove this restriction from S. 677, argued: "...if we had gotten broader support and more cooperation from the Department of Agriculture in studying these market orders, perhaps we would not have to seek the ability of the FTC to study them. But such being the case, and the facts and the inability to get these things properly examined, I at least wanted to have another avenue available to study them, their effect on the agricultural system, the loss of agricultural output that accompanies such marketing orders, and the effect on consumers as well as the effect, of course, upon the entire agricultural infrastructure." (Cong. Rec., S. 4792, April 8, 1987)

Finally, we can summarize this supporting statement for an unfettered FTC authorization by citing a current example of the need for FTC authority in agriculture. In testimony in 1982, NIDA called attention of the subcommittee to an FTC action in the matter of Western General Dairies. A consent order had been negotiated by FTC some time earlier whereby Western General, a Capper-Volstead dairy cooperative, operating in Utah and elsewhere in the mountain states, agreed to cease certain anti-competitive activities including price discrimination and the use of trade restraining contracts. Now almost 10 years later, this cooperative, now part of the larger Western Dairymen Cooperative, Inc., is the defendant in another antitrust complaint settling consent order with the state of Utah. The Attorney-General of Utah brought action against Western Dairymen Cooperative, Inc., its chief executive officer and others for violations of the Utah Antitrust Act. These violations were based on actions which the defendants were enjoined from continuing to engage in, including:

(a) fixing prices
(b) collusive bidding
(c) allocating territories and customers, and exchanging and communicating bidding information on sales of milk or dairy products.

Additionally, the defendant Western Dairymen Cooperative, Inc. is "enjoined from using coercion, threats or intimidation to induce any producer to join or to refrain from terminating" its cooperative membership.

Also, for "a period of five (5) years Western Dairymen, is enjoined and restrained from discriminating among similarly situated producers as to the price or the gifting or granting of anything of value, including base, to a producer where the purpose of such discrimination is to induce a producer to terminate a supply agreement with another processor, to terminate a membership or marketing agreement with another person, to refrain from selling or delivering raw milk to another processor, or to become a member-producer of Western Dairymen Cooperative, Inc."

The consent decree has other important prohibitions such as limiting Western Dairymen's membership contracts to one year with adequate termination notice provisions. The cooperative must refrain from price discrimination in wholesale contracts "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in violation of the Robinson-Patmen Act." (15 USC 13 (a)-(f) or the Utah Unfair Practices Act).

In addition, Western Dairymen is prohibited from forcing committed full raw milk supply contracts as a condition to supplying milk to processors. The cooperative cannot discriminate in the price charged for raw milk to similarly situated processors which lessens competition.

In addition to the state action, there are pending civil damage actions brought by producers and competing cooperatives who were injured by these anticompetitive, trade-restraining actions by Western Dairymen and others.

This is the unhappy state of affairs for the dominant dairy cooperative in the mountain states which once boasted of having a perfect monopoly in milk supplies throughout its multiple-state region. The final costs of all of this litigation is unknown, but it is certain that Western Dairymen's dairy farmer members will be stuck with much of the costs and losses.

The lesson of this matter in Utah and the mountain states is important to this FTC authorization legislation. NIDA recalls that some years ago it brought to the attention of FTC's staff certain anticompetitive practices by the dominant dairy cooperatives in the region. NIDA was informed by FTC's staff that since the matter included a milk marketing order, FTC could take no action nor expend any funds. NIDA cannot speculate on the possible outcome of antitrust violations in the mountain-states area had the FTC been unfettered by restrictions, but it is sure that had effective action been taken earlier, Western Dairymen's farmers would be in a better economic situation.

An important question should be asked: Where has the Secretary of Agriculture been during this period of bid-rigging, collusion, price discrimination, and trade-restraining contracts involving the dominant cooperative in the mountain states? The answer is easy. The Secretary has never used his authority under Section 2 of the Capper-Volstead Act (7 USC 292). When it was publicly announced by the leaders of the dominant mountain-states dairy cooperative that it was building the perfect monopoly over milk supplies, the Secretary was using USDA resources to determine the feasibility of assisting them in forming a huge conglomeration of cooperatives from the California border to the Mississippi River and beyond. In testimony before this Subcommittee on February 5, 1987, NIDA quoted the following from the dairy press:

> "The combined boards of Associated Milk Producers, Inc. Mid-America Dairymen, Inc. and Mountain Empire Dairymen's Assn. will meet in St. Louis, September 18-19, to review a USDA study on possible two-way and three way mergers involving those cooperatives.
>
> It is very possible that the structure of the dairy industry could look noticeably different, come January 1. Putting these three major cooperatives into a merged organization would unite producers form Texas to the Canadian border, from Colorado to Indiana -- nearly 40,000 producers in one organization." ("Three Co-op Boards to Review USDA Merger Study," The Milkweed, Issue No. 87, August 1986.)

The same question of where the Secretary of Agriculture is on the issues of monopoly and injury to competition should be asked in hindsight regarding the huge costs now certain to fall on the membership of Associated Milk Producers, Inc., Mid American Dairymen, Inc. and others. This results from the final damage awards in Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982) since the Supreme Court denied final review of the case.

In looking to the future, where will the Secretary be on the issue of multiple state milk marketing commissions formed by interstate compacts? Also, where will the Secretary be on the issue of anticompetitive, cartel-enhancing state laws, as described later in this statement?

The Federal Trade Commission must not be encumbered or restricted in the area of antitrust enforcement in agriculture. The Attorney-General plays a large role, but the FTC is necessary. The vacuum created by the Secretary of Agriculture's inability or unwillingness to act is too big for only the Justice Department. Further, FTC's competition advocacy program is a vital step in the process of maintaining the free enterprise system in agriculture.

Reports have been made and issued from time to time by the Department of Agriculture, the General Accounting Office and special commissions, such as the National Commission on Dairy Policy created under the 1985 Agriculture bill. These reports have examined Federal laws, regulations and programs in the dairy industry but none of them have examined structure and performance from the viewpoint of competition, competitors and markets. None of these agencies have the expertise of the FTC.

III. COMPETITION ADVOCACY

An extremely important example of the FTC's expertise at work has been its Competition Advocacy Program. Under this program, the FTC encourages state and local legislatures and federal, state and local regulatory agencies to consider competition policy and consumer welfare when enacting legislation or issuing regulations. This program, like FTC's ability to work with agricultural regulations, is threatened with extinction by encumbering it with unnecessary reports and clearances. S. 677 (the FTC authorization bill from the 100th Congress) would have required the FTC to notify the Senate Commerce Committee and the House Energy and Commerce Committee at least 60 days before filing comments or making an appearance before federal state or local agencies. The House bill from last year, HR 2897, had a much more damaging section. Its provision required compliance with a tortuous procedure of notices to the committees and congressional delegations. The FTC would be "hamstrung" by the prior paperwork involved in the notices. It appears that the purpose of the House provision would be to prohibit the FTC from acting on its initiative; to require total prior disclosure of all names, facts, data, documents in addition to all statements, comments or opinions; and to allow time for the Committees or the state Congressional delegations to intercede for political purposes if desired. The House bill also would require official action by the FTC, rather than unofficial staff member comments, on legislation, rules, or regulations, whether federal or state. The FTC would be restricted to a maximum expenditure of 5% of its budget for this competition advocacy program.

The FTC offered support in the successful effort to bring more competition into New York milk markets. The more important concern for all of this country's business, should this Congress destroy the effectiveness of FTC's competition advocacy, is the blatant use of special interest political power to enact trade restraining laws in state legislatures to favor special economic groups. This is now going on in the Northeast. Powerful agriculture interests particularly the Northeastern dairy producer monopolist federation, is trying to force a special interest law through the New York Assembly. The so-called "dairy farmer bill of rights" in New York, which is now modified from the version vetoed by Governor Cuomo last year, would effectively prevent competing milk dealers, processors and manufacturers from soliciting milk supplies from New York dairy farmers. It would, in effect, make it a crime to compete for a supply of raw milk in New York. No handler could offer a higher price or an inducement of value to a dairy farmer not only if the farmer is a federation member but even if the farmer is contemplating membership. The purpose of the law is obvious. It is designed to enforce the power of the regional federation's monopoly. It has no other merit. This type of legislation has been condemned by consumer groups, the attorney-generals, and city officials.

The FTC needs to advise the people of New York and other Northeastern states and other states about the increased costs to consumers and the loss of marketing opportunities for farmers which will result from this narrow special interest legislation.

Another, perhaps more ominous threat, is now being launched by the proponents of the intestate dairy commission compact laws. This scheme, advanced in the guise of promoting and protecting the dairy industry, would substitute a regional interstate dairy commission for federal marketing orders. It would be implemented by an interstate compact, executed with the consent of Congress. This added layer of bureaucracy would penalize and suffocate the free enterprize dairy industry under the banner of helping the poor family farmer.

Again, it is clear that the FTC's Competition Advocacy Program is needed. Taxpaying and competing proprietary dairies are an essential part of the industry in bringing high quality, low cost, innovative products to the consumer. Trade restraining state laws which penalize competition and bureaucratic commissions are not needed.

This Subcommittee should be aware that representatives of the U.S. Department of Agriculture are aiding the efforts to restrain trade in dairy through these proposed laws in state legislatures. NIDA and taxpaying small business proprietary dairies want to be assured that the FTC is on their side and will be able to be on their side in the future.

Anti-merger authority and competition advocacy by FTC is needed when one considers the following answer by the Secretary of Agriculture to a question NIDA asked two years ago concerning the feasibility studies of USDA's Agricultural Cooperative Service (ACS):

> "One of the objectives of the technical assistance, research, and information activities provided by ACS is to help farmers adapt their cooperatives to changes in market structure. During the past 30 years, over 5,000 non-cooperative dairy firms have dissolved or consolidated into fewer milk buying firms. A recent ERS study states that the number of companies in each of the dairy industries continues a long-term decline. Fluid milk companies fell from 3,000 in 1967 to about 850 in 1982, while the number of butter companies fell from over 500 to about 40. Family farmers have also voted to consolidate their cooperative when they decided that was the best way to meet their needs as producers. When requested, ACS has provided technical assistance concerning proposed restructurings."

NIDA is convinced that the FTC's role is too important for agriculture in the 1990's, and, therefore, no restrictions on its authority or funds should be included in any new authorization legislation. FTC is in the position, not only to aid small business processors and consumers, but to protect the pocketbooks of cooperative member farmers from future damage awards by stopping violations from the beginning. The Secretary of Agriculture has demonstrated that this is a role he is unable or unwilling to perform.

FTC's Competition Advocacy Program should be fully heard by this Subcommittee. It should be fully recognized, funded and enhanced by the Congress. NIDA recommends to the Subcommittee that this program is too important to be "encumbered out of existence" by petty notice restrictions. It should receive the necessary formal structure in FTC's authority and budget that it deserves.

Thank you. I welcome any questions that the Members of the Subcommittee might have.

NATIONAL
INDEPENDENT
DAIRY-FOODS
ASSOCIATION
SINCE 1957

321 D STREET, N.E., WASHINGTON, DC 20002, (202) 543-3838

NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION(NIDA) RESPONDS TO QUESTIONS REGARDING FEDERAL TRADE COMMISSION REAUTHORIZATION

Q: YOU OPPOSE LIMITING THE FTC'S AUTHORITY OVER AGRICULTURAL COOPERATIVES, BECAUSE YOU BELIEVE THAT THE SECRETARY OF AGRICULTURE AND THE JUSTICE DEPARTMENT ARE RELUCTANT TO EXERCISE THEIR AUTHORITY IN THIS AREA.

-- CAN YOU CITE SPECIFIC EXAMPLES IN SUPPORT OF THAT POSITION?

-- IS IT BECAUSE THE LEGAL AUTHORITY IS INADEQUATE, OR IS IT MERELY A LACK OF RESOLVE ON THE PART OF THE DEPARTMENTS OF JUSTICE AND AGRICULTURE THAT CONCERNS YOU?

NIDA: It is an understatement to say that The Secretary of Agriculture is reluctant to use Section 2 of the Capper-Volstead Act. The fact is that he has never used this authority in the entire history of Capper-Volstead since 1922.

For instance, the attached copied pages from the USDA document entitled "The Question of Undue Price Enhancement by Milk Cooperatives" Capper-Volstead Committee, December 1976 clearly demonstrate the problem (See the highlighted portions).

At the highest point of the predatory anti-competitive conduct by the major dairy cooperatives in the country in the mid-1970's, the Secretary, when confronted with a well-documented Section 2 complaint, appointed a cursory "committee" of economists to investigate the complaint and make a report. Members of Congress and the public are well aware of how to bury an issue when you do not want to take action--you simply appoint a committee. This is what the Secretary did despite the fact that the U.S. Department of Justice had pursued successful antitrust actions against all of the largest cooperatives involved in the price enhancements and monopolizations.

In the Section titled Conclusions on page 53, the Report cited the Department of Justice actions against "Associated Milk Producers, Mid American Dairymen and Dairymen Inc., three of the nation's largest dairy cooperatives, for improper and predatory actions." The Secretary's Committee explained that these actions "have been or soon will be resolved by consent decree" and the third one against Dairymen Inc. awaited a decision.

While the Secretary remained idle, the Department of Justice obtained orders against all of these cooperatives for violations of the Sherman Act, based on the use of predatory acts to monopolize or attempt to monopolize fluid milk supplies and dairy markets. Section 2 of Capper-Volstead specifically authorizes the Secretary to prevent the acts which are intended and designed to achieve monopolies and to destroy competition. The Secretary had access to all of the statistics and information of these acts by the cooperatives and their federations long before the Department of Justice. It is likely that the Secretary (USDA) compiled the data and made it available to the Department of Justice and the DOJ made use of USDA data in building its cases and bringing them to trial.

The highlighted portions of the pages of the Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, (January 22, 1979) (see attached) demonstrate the problem of enforcement of antitrust violations in agriculture. This report concludes that the authority to enforce Section 2 of Capper-Volstead should be separated from the Secretary, because "the Department of Agriculture currently is charged with both promotional and enforcement responsibilities with respect to cooperatives." (page 263) (See also June 18, 1987 letter to Randall from Secretary Lyng and USDA Report: Review of Existing and Alternative Federal Dairy Programs, selected pages attached.)

This antitrust report also concludes that "While the enforcement agencies [including the Department of Justice] have not conceded that two cooperatives can merge without regard to resulting market dominance, they have not challenged any of the major cooperative mergers that have taken place over the last ten years (page 258)." In fact, the Department of Justice informed the Supreme Court in an amicus brief some years ago that farmers could voluntarily join together to form a cooperative, common marketing agency, federation or cartel of any size as long as it was done by lawful means without predation.

The National Independent Dairy-Foods Association is concerned by both the unused legal authority for the Secretary and the unclear authority of the Department of Justice. As both the 1979 antitrust report to the President and the report of the of the Capper-Volstead Committee indicate, the term "undue price enhancement" is vague. Of course, this could be cured by legal interpretation, regulation and judicial decisions, if the Secretary would take action. Congress could clarify it and direct the threshold for action.

The Department of Justice is in doubt about its authority because of the broad sweep of Capper-Volstead, or rather the "broad sweep" the courts have applied. When the circumstances of the case or when the Justice Department is uncertain about jurisdiction, the maxim "when in doubt do nothing" is appropriate. The Department of Justice has acted successfully when its authority is clear, i.e., when there is a noncooperative merger, partner or joint venture such as the recent Dairymen Inc.-Borden arrangement which was abandoned when it came under scrutiny by the Department of Justice.

In further response to whether the Secretary of Agriculture is reluctant to exercise authority; has inadequate legal authority to act; or lacks the resolve, a good answer is supplied by Secretary Lyng's response to NIDA in his June 18, 1989 letter. NIDA had asked a series of questions of the Secretary in an earlier letter concerning the functions of the Agricultural Cooperative Service (ACS) in assisting agricultural cooperatives to merge or form federations and cartels. (A copy of the portion of the response relating to the ACS is attached.)

The following conclusions are already shown by the

Secretary's response:

1. Neither ACS nor the Secretary have considered the impact of the merger assistance on consumers. ACS is authorized to assist cooperatives.

2. ACS does not concern itself with competition or competitors except for the efficiency of the cooperative merger or federation.

3. ACS does not concern itself with the adverse impact of a merger on smaller market participants.

4. ACS is not concerned with CCC program costs.

5. ACS is not concerned about milk orders when assisting mergers.

6. ACS usually doesn't consult with USDA's General Counsel when assisting mergers; and

7. Neither ACS nor the Secretary consult with the FTC, Department of Justice nor any State Attorney General.

Therefore, the National Independent Dairy-Foods Association believes that there is a definite lack of resolve present at the Department of Agriculture. This is also true, to a degree, at the Department of Justice, but only because of the lack of authority at the Justice Department to attack agricultural cooperatives that are designed for market dominance or monopoly. The Secretary of Agriculture could clear up any confusion over "undue price enhancement" by legal precedent or he could ask Congress to re-examine Capper-Volstead.

Q: YOU SUGGEST THAT THE LIMITATION ON FTC AUTHORITY REGARDING

AGRICULTURAL COOPERATIVES CANNOT BE BASED ON THE WIDELY HELD IMAGE OF FARMERS AS ISOLATED, SMALL UNITS WHICH ARE UNABLE TO COMPETE IN THE MARKETPLACE BECAUSE THAT IS NOT TRUE. IN FACT, TODAY THE MARKET CONSISTS OF LARGE CORPORATE FARMS.

> **-- DO LIMITS ON THE FTC'S AUTHORITY ASSIST IN MAKING THESE GIANT PLAYERS BIGGER, AT THE EXPENSE OF FAMILY FARMERS?**

NIDA: NIDA does not mean to create the impression that today's market consists solely of large corporate farms. However, the Federal Trade Commission should be a role player in the economic struggle involving large food companies, large cooperatives and independent processors and producers. Historically, the FTC has attacked one side of the equation--it has obtained orders against the corporate or proprietary side of the industry. The FTC could examine the economic facts about farmers as competitive units. It should be authorized to examine mergers. It could examine mergers of cooperatives that reduce marketing opportunities for small family farmers. However, in reality, it is evident that no amount of FTC involvement under any foreseeable new authority will change the economies of scale and efficiencies in farming. Farmers will continue to incorporate and grow larger.

Q: YOU EXPRESS SUPPORT FOR THE CONSUMER ADVOCACY, OR "INTERVENTION", PROGRAM. YOU POINT OUT THE FAILINGS IN THE HOUSE BILL FROM LAST YEAR. WOULD YOU SUPPORT THE PROVISION IN THE SENATE BILL, WHICH REQUIRES NOTICE BY THE FTC WHEN IT INTENDS TO INTERVENE?

NIDA: NIDA would support the Senate version if that is the only alternative to the unacceptable House version. NIDA believes that the program is so important that the Subcommittee should ask the Commission about the funds and legal tools it needs to do a better job in expanding and improving the Competition Advocacy

program. NIDA believes that ordinary Congressional oversight by the Committee should be sufficient to insure "reasonable" performance by the FTC.

NIDA believes that prior notice is unnecessary, but perhaps the competition advocacy procedure should be formalized at the FTC. The Commission should not be making major pronouncements unofficially, however, NIDA does not believe the program should be destroyed by making it adversarial or subject to hearings and appeals. If the program is made subject to challenges by members of Congress, federal or state officials, or affected trade groups or members of the public, it will become ineffective and useless. NIDA believes that the public should be informed. NIDA believes that Congress should make use of its authority to thoroughly examine the nominees for the Commission and its Chairman during confirmation proceedings. Annual oversight and periodic authorization hearings will be sufficient notice to Congress of FTC policy and programs.

1/ The attachments and exhibits referred to in these answers were not reproducible.

Senator BRYAN. Thank you very much, Mr. Randall.

Mr. Owen, let me begin with a question to you. I must confess I have a little difficulty in understanding the rationale for exempting the agricultural cooperatives from the purview of the Federal Trade Commission, because it seems to me that individuals may or could be victimized by anticompetitive practices in that sector of our economy, just as we know they have been in other areas of our economy. I want to give you the opportunity, since I am a new member to the Congress, to share with me this rationale.

Mr. OWEN. Let me explain that, first, the language that has been in the resolutions and the appropriations bill to which I referred does not preclude all Federal Trade Commission activity involving cooperatives. It only is intended to prevent the Federal Trade Commission from engaging in studies, or investigations, or prosecutions of activities which Congress has already declared to be exempt under the Capper-Volstead Act. There is authority in the Justice Department to look at activities of cooperatives. It is not restricted in any way.

Senator BRYAN. So in other words, if the Congress has specifically said this kind of activity is approved, we ratify it as a matter of public policy; you are saying that with respect to that particular type of activity the FTC has no jurisdiction because of an exemption, but with respect to other activity unaddressed specifically by the Congress, the FTC is not impeded from proceeding with rulemaking? May it proceed on a rulemaking basis?

Mr. OWEN. I do not know that it has ever entertained that idea, but I do not know why it could not.

Senator BRYAN. And it could proceed in terms of affirmative actions to eliminate or to require a change in a practice which it felt was anticompetitive?

Mr. OWEN. Yes, it could.

Senator BRYAN. I think I understand your position now.

Now, Mr. Randall, let me ask you, do you agree with Mr. Owen's analysis of the law? If you do, what is wrong with that?

Is there a problem with the Federal Trade Commission not moving aggressively, or do you fault the Congress for making some policy judgments that take certain areas off-limits?

Mr. RANDALL. Well, first, I would take exception to the broad sweep of the Capper-Volstead exemption, that the cooperatives have for many, many years abused——

Senator BRYAN. Let me stop you there, without being rude in any way. But you are saying that you do not agree with the Capper-Volstead Act? That is too expansive?

Mr. RANDALL. It is too expansive. But moreover, within the Federal Trade Commission and the language suggested here, market orders are off-limits to them. For instance, they may not study market orders and report to the Congress.

Senator BRYAN. Is that because of Capper-Volstead?

Mr. RANDALL. No. That is because of the provisions that the cooperatives got into the appropriations bills and now have been adopted into the continuing resolutions. They may not look at market orders. And very frankly, Senator, there are not very many members of the Congress, nor members of the public, nor members even of the dairy industry I can speak for personally who understand market orders. In fact, when you talk to a member of Congress about market orders, in general they tend to glaze over and say do not bother me with that. I do not have a long enough tenure in Congress for me to understand those things.

The Congress needs an agency like the Federal Trade Commission to take a look at what these organizations are doing and how they are using the market orders. Are they working? Are they of benefit to the public? How does the public benefit from cartels that are being proposed in the northeast, regional consortiums of cartels, which will forbid my members paying or even offering to pay the farmer a higher price for milk if he is a member of the cooperative or has discussed even becoming a member of the cooperative?

How does a cartel in New York and New England, as it is now being proposed, which can assess over order premium prices by agreement, and then add additional charges for administration, and then charge that back to the handlers, and then bill that back to the public, how can that, in effect, benefit the public? Should not the Federal Trade Commission be able to go in and look at the economic conditions in the northeast, look at the marketing where you have got thousands of small, independent farmers who are marketing, and determine what the factors are there that influence this?

I was really heartened by Attorney General Abrams' comments about the working between the states and the federal. I see that for a role here in dairy, not only in insurance, but where you have got experts who can come in and advise the states, and to look at this interstate shipment of milk and the withholding of it, and the other agreements that are restrictive.

Senator **Bryan**. We appreciate your response, Mr. Randall.

Mr. Owen, let me bounce the ball back to you, if I may. Assume, for the sake of argument, that the Congress made the judgment no longer to leave those marketing orders off base, that the language of the appropriation bills was changed, the continuing resolution language was changed. What great vice would occur, from your perspective, to the agricultural cooperatives to make them subject to at least purview and inquiry and perhaps, under the appropriate circumstances, even action if an anti-competitive practice was found?

Mr. **Owen**. Well, the marketing orders are the product of an Act of Congress, the Agricultural Marketing Agreement Act of 1937, and that statute gives to the Secretary of Agriculture the authority to promulgate marketing orders. And marketing orders involve many different agricultural products; they are not peculiar to the dairy industry.

Senator **Bryan**. I understand.

Mr. **Owen**. Hearings that the Secretary holds on the proposals of marketing orders are open to not only members of the public but other governmental bodies. I believe there have been instances in which the Attorney General may have given some testimony in connection with marketing orders.

To give another agency oversight in the sense that another agency of government is going to go in and oversee what the Secretary of Agriculture is doing in this area just seems to us to be confusing policy. This is something that the Secretary not only has the staff and the abilities to handle, but conducts it an open manner, which gives the opportunity to all parties who are at interest, handlers as well as farmers, to participate in a promulgation and a change in the amendments of marketing orders.

Senator BRYAN. Mr. Owen, would you concede that the Secretary of Agriculture, without impugning the Secretary's motives or integrity, may very well have a different focus on a marketing order, as opposed to an agency that is charged with the primary responsibility of protecting the consumer from an anticompetitive practice?

Mr. OWEN. Well, I think in that respect he is only carrying out the mandates of Congress in the Agricultural Marketing Agreement Act.

Senator BRYAN. So your view is that whatever the Secretary's interest or range of view might be of the issue, the Secretary is constrained by the policy mandates of the Congress to look at only a, b, and c, as opposed to, perhaps, d, e, and f?

Mr. OWEN. I think that is probably a fair statement. I think that if you want to tamper with the marketing order system, that you should not do it by suggesting that the Federal Trade Commission be the person or the agency that is going to try and step in and change a policy or a law that has been adopted by Congress.

Senator BRYAN. I appreciate your educating me on that.

One last question of you, Mr. Owen, if I may. The attorneys general, you mentioned that—or I think Mr. Randall did—that the attorneys general have been involved from time to time. Does the language that is included in the appropriations bill, does the continuing resolution language preclude state overview? That is to say, may the attorney general of a particular state file an action because he or she believes that the terms of the marketing order have adverse impact upon the consumers of the given state, or is there a pre-emption there?

Mr. OWEN. Let us not confuse the two points here, marketing orders and the Capper-Volstead exemption. The state attorney general would have just as much right to appear at a hearing on a marketing order as any other person.

Senator BRYAN. I understand that.

Mr. OWEN. If you are talking about the right of a state attorney general to enforce either the state's antitrust laws or, under circumstances where the state attorney general might have standing to proceed under the Federal antitrust laws, that will not be affected by the proposal here.

Senator BRYAN. Let me be sure that I understand, because that is the framework that I am discussing right now, the state attorney general purporting to act on behalf of legislative authority in the respective states, either in antitrust or in some other type of unfair consumer practice. And my question is, does Capper-Volstead preclude the attorney general from moving in these areas?

Mr. OWEN. If the attorney general were to seek to enforce a right under Federal antitrust law, then he would be subject to any practice or—excuse me—any activity of a cooperative would have the benefits of the Capper-Volstead exemption in a suit under Federal law. If a state attorney general wanted to proceed under state law, then the Capper-Volstead Act would not be applicable; and the question then would be what that state's own antitrust laws provided. And neither the Capper-Volstead Act nor the restrictions that we propose be imposed on the Federal Trade Commission would have any adverse effect on the state attorney general's opportunity to proceed.

Senator **Bryan**. I appreciate that, Mr. Owen.

Now, Mr. Randall, let me ask you, do you agree with Mr. Owen's analysis that the attorney generals, at least in theory, under their state-empowered role as enforcers of state antitrust law or consumer protection legislation, would have the ability to intervene and to take appropriate action if some anticompetitive practice or unfair consumer activity was occurring?

Mr. **Randall**. In limited circumstances they would, if it involves the Agricultural Marketing Act and the marketing orders that preempts the state from bringing action against the entities involved in that. So they would be limited, but they could bring those state actions, and indeed, they do. There have been quite a number of them, in spite of the fact that the Secretary seems to have been absent in his attention to this area. There have been a large number of instances in which they have been prosecuted for price fixing, territorial allocation, tie-in contracts with their operators and with their producers, and other antitrust activities that were harmful to the American consumers.

Senator **Bryan**. Mr. Randall, could you give me some examples? I know our time is somewhat limited, but could you give me some examples from your perspective of the inability of the Federal Trade Commission to exercise some jurisdiction with respect to these marketing orders and other kinds of activities which may be taken off limit in the continuing resolution language, or other provisions of the Capper-Volstead Act?

And by the way, is this Volstead fellow the same guy that gave us Prohibition?

Mr. **Randall**. That is the same one.

Senator **Bryan**. I draw no inferences from that. But that was an intriguing name.

Mr. **Randall**. Mr. Chairman, the one example is the Western General Dairies. That is a case that was brought in Utah, and consent orders have been issued, and orders prohibiting them from engaging in anticompetitive and injurious practices has finally resulted. But that case was initially brought to the attention of the Federal Trade Commission in 1985, and they said we are sorry, we cannot act, because the cooperatives had come into Congress and effectively tied up their appropriations so they could not have funds to do so.

Now, had that come to a fruition of an investigation, we think it would have headed off the injury to competition that occurred out there, the many lawsuits that have now been brought, and the horrendous costs that those producers are going to have to pay, both in terms of litigation costs and damages ultimately. Recently, a multimillion dollar judgment against AMPI and others was sustained by the Supreme Court. It is going to wind up costing literally tens of millions of dollars in damages.

Senator **Bryan**. Was that an action brought by the attorneys general?

Mr. **Randall**. That was private litigation, but there are any number of instances recently where—and we will be glad to submit for the record some additional comments.

Senator **Bryan**. Mr. Randall, is that private litigation, is that under the Clayton Act?

Mr. **Randall**. It was under the Sherman Act.

Senator **Bryan**. Okay. The action that you have described in Utah, was action by the Federal Trade Commission precluded under the existing structure? Or was it the lack of aggressiveness—and we have heard some comment, as you know, here about that approach——

Mr. **Randall**. No. It was just simply that they could not go into it.

Senator **Bryan**. Well, gentlemen, I appreciate very much your testimony. Thank you so much.

If there are additional questions that the subcommittee members might have, we would appreciate your answers to them as well.

The subcommittee hearing is adjourned, and the subcommittee stands in recess until the call of the Chair. Thank you very much.

[Whereupon, at 11:45 a.m., the subcommittee recessed.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

NACAA,
Washington, DC, June 7, 1989.

KEVIN CURTIN,
Senior Counsel, U.S. Senate, Consumer Subcommittee, Commerce, Science, and Transportation Committee, Washington, DC.

DEAR MR. CURTIN: At our recent annual conference the National Association of Consumer Agency Administrators (NACAA) passed the attached resolution which calls for a stronger, more effective and more enforcement-minded Federal Trade Commission.

NACAA will not provide oral testimony at the Committee's FTC Reauthorization hearings, but requests that the attached resolution be incorporated into the testimony and comments related to these hearings.

We appreciate your assistance and cooperation in this matter.

Sincerely,

BARRY W. REID,
Immediate Past President,
National Association of Consumer Agency Administrators.

Attachment.[1]

STATEMENT OF FORMER FTC COMMISSIONER MARY GARDINER JONES ON BEHALF OF THE OLDER WOMEN'S LEAGUE

On March 16, 1988 I appeared as a witness at the FTC Hearing on Older Americans on behalf of the Older Women's League which is an organization formed in 1982. We have 120 chapters with about 20,000 members and our primary focus relates to the concerns and special problems of older women.

As the FTC budget and priorities are currently examined by the Congress, I take this opportunity to repeat a message that was also relevant at that FTC hearing; namely, that the time has come to reinstate the FTC's jurisdiction to study and investigate the insurance industry. That need is underscored by the consuming public's inability to rely on a vigorously competitive insurance market—in large part because of the insulation from major antitrust enforcement which is enjoyed by the insurance industry as a result of the McCarran-Ferguson Act.

With respect to older Americans there is a particular sense of urgency. FTC Chairman Streno emphasized that this point in my earlier testimony deserves special emphasis. The FTC recognized that the elderly do not have the time to wait for the effects of long-range programs designed to stimulate competition or to educate them about potential abuses and pitfalls in the marketplace.

Older Americans are forced to cope with the problems in the market as it is today. There are 27 million elderly citizens over 65. They have median financial assets of $11,000, only one in five have stocks. They have a median annual income for men, of $10,900, and women, of $6,300. 61 to 70% of elderly are women and 41% of those women live at or near the poverty level which today for the elderly person is $5,156. A third of these women need home-based care and one-half of them live alone.

Today the elderly are increasingly being victimized by fraudulent marketing practices specifically targeted to their vulnerabilities. The life care industry is another area of critical potential abuse of midlife and older women. Since women live longer than men, it is women who typically look to life care institutions in which to spend their remaining years. If they are misled or deceived by the promises and representations of these institutions or if the institutions fail financially, it is their savings which will be lost.

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[1] The attachment was not reproducible.

If you are going to be concerned about the elderly today then you have to think about a mix of enforcement strategies that are going to take care of the problems for the elderly today as well as for the elderly of the future. In short, just as the elderly need repeal of the McCarran-Ferguson Act and the more effective competition such repeal would stimulate, the elderly also a strong FTC presence in the insurance investigatory arena. It is the only agency really that they can turn to. The FTC must have the authority of a Congressional mandate to go to the source of the problems that senior citizens are coping with and to aid in eliminating the practices that are victimizing them.

Minimally that means approval of Section 14, Insurance Studies and Section 15, Life Care Home Study as contained in the FTC Reauthorization legislation currently being considered. An important first step is for the FTC to develop comprehensive studies for example, of unfair, deceptive or misleading practices in the sale of health insurance to the elderly, an examination of the premiums charged for such policies compared to the actual claims paid, and an examination of the enforcement effectiveness of the states in preventing such unfair, deceptive or misleading practices.

Likewise, a comprehensive study of the life care industry is long overdue. It is an important industry because it is not clearly been regulated yet. It remains basically unregulated despite the devastating impact it can have on the lives of the elderly. It is essential that Congress mandate FTC studies and investigations in these critical health care insurance and life care areas. It is also critical that Congress exercise vigilant oversight over FTC enforcement practices to ensure that older consumers will in fact receive the protections of the law that Congress has mandated the FTC to provide.

Hopefully, however, the Congress will recognize that FTC study and investigation authority must also be accompanied by adequate enforcement authority. Older consumers should not rely merely on consumer education but on a strong government watchdog such as the FTC.

ANA
ASSOCIATION OF NATIONAL ADVERTISERS, INC.
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MEMBER, WORLD FEDERATION OF ADVERTISERS

June 22, 1989
A.N.A.'s 79th Year

Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
Committee on Commerce, Science and Transportation
United States Senate
364 Senate Russell Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

The Association of National Advertisers (A.N.A.) appreciates the opportunity you afforded us to testify before the Consumer Subcommittee on June 7th regarding the reauthorization of the Federal Trade Commission (F.T.C.). Several issues were raised during the hearing which require amplification.

A.N.A. supports strong regulation of the interstate marketplace. False or deceptive claims by unscrupulous marketers severely hurt all honest advertisers as well as consumers. The issue for all concerned groups is not whether there should be regulation but how regulation can be most effectively carried out and who should have regulatory responsibility. The fundamental issue in our view is one of federalism: can the states effectively regulate the national marketplace?

State attorneys general and their staffs are talented and hardworking law enforcement officials. No matter how well intentioned they may be, however, it is impossible by the very nature of their independence, for the states attorneys general to coordinate fully the regulation of national advertising. Even if the state attorneys general could conceptually agree on state regulatory uniformity in the advertising area, this would fall far short of assuring regulatory uniformity or even effective coordination. True coordination requires that the fifty state legislatures, and the thousands of state legislators who substantially control the authority of the state attorneys general through their lawmaking powers, be able to coordinate and march in unison in the area of advertising regulation. Even a cursory examination of legislative and regulatory developments in the advertising area demonstrates regulatory inconsistency rather than uniformity. A.N.A., therefore, strongly believes national regulation of advertising is the only effective means to combat deceptive advertising and protect the interstate marketplace.

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JOHN C. REID, Coca-Cola USA
JOHN E. RUHAAK, United Airlines
STEPHEN W. RUTLEDGE, Kraft, Inc.
HANS L. STERN, Brown-Forman Corporation
GEORGE F. TYRRELL, Johnson & Johnson
JOHN T. WINEBRENNER, R.J. Reynolds Tobacco U.S.A.

Another important issue was raised at the hearings by Bruce Silverglade, Director of Legal Affairs for the Center for Science in the Public Interest. Mr. Silverglade appeared to suggest that lack of regulatory uniformity at the state level is not a major problem. Mr. Silverglade implied that what advertisers merely needed to do was follow the most "stringent" state regulation and that the most stringent regulation was clearly the best.

A.N.A. strongly questions that such a generalization can be upheld. In our view, the test of regulation should not be how stringent it is but rather whether it most effectively enhances protection or the national marketplace? In the advertising area, overly restrictive regulation hurts business and consumers and can make whole categories of honest advertising impossible or impractical. It can drastically and unnecessarily increase the costs of advertising which are eventually passed on to the consumer. Furthermore, multiple regulation, if it is inconsistent, will make national advertising virtually impossible.

I hope these additions to our earlier testimony clarify our views. A.N.A. again urges you to reauthorize the F.T.C. while maintaining a national regulatory scheme over interstate commerce. We also hope that you retain the Senate position, which has been maintained for the last seven years, that places a permanent ban on the F.T.C.'s use of unfairness for Trade Regulation Rulemaking.

With best wishes,

Sincerely,

Dan L. Jaffe

Daniel L. Jaffe

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June 26, 1989

Honorable Richard H. Bryan
Chairman
Subcommittee on Consumer
U.S. Senate Committee on Commerce,
Science and Transportation
SH-227 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to tell you of the strong opposition of the Coalition for Competition to the restrictions on the Federal Trade Commission's competition advocacy program proposed in last year's House FTC authorization bill, H.R. 2897. I would appreciate it if you could include this letter in the record of your recent hearing on the FTC reauthorization.

The Coalition for Competition is a broad-based alliance of large and small manufacturers, wholesalers, and distributors of high-technology products and their trade associations. The Coalition was established in 1982 to identify and focus attention on legislative proposals at both the federal and state levels that would reduce competition and raise consumer prices by restricting the free and open marketing of products through independent wholesale and retail dealers.

In the 1982-85 period, the Coalition successfully opposed federal legislation pending before the House and Senate Commerce Committees that would have locked suppliers of office products into existing distribution relationships by making the termination or non-renewal of their dealer agreements unduly expensive, complex, and legally risky. This legislation would have reduced competition at both the supplier and the dealer levels, because it would have limited the ability of suppliers to maintain efficient distribution mechanisms, and limited the opportunities available to small businesspeople who wanted to become new dealers. As Congress ultimately recognized, higher costs and higher prices are the result of such protectionism, to the detriment of consumers.

More recently, the Coalition has been active at the state level, monitoring a variety of similar bills introduced in state legislatures, providing written and oral testimony at hearings, and taking other steps to bring concerns to the attention of responsible state officials. This has proven to be a major undertaking; over a two or three year period, the Coalition has been involved to at least some extent in more than a dozen states, as well as in the effort by the National Conference of Commissioners on Uniform State Laws to draft model state legislation in this area.

The Federal Trade Commission has already contributed valuable information, analysis and insights to the consideration of these legislative proposals, and it should retain its authority and flexibility to continue to do so. The House and Senate Commerce Committees both invited the FTC to testify at their respective hearings on the restrictive federal legislation, clearly recognizing the unique, balanced contribution the FTC could make to the Committees' understanding of the competition policy issues presented. The FTC should remain equally free to participate at the state level, as well, where its expertise, resources, and policy perspective may be even *more* valuable.

Last year's House FTC bill would have the effect of limiting the FTC's participation, however, in ways that are both unnecessary and unwise. Under the House bill, the FTC would be discouraged entirely from providing an objective, useful perspective in many instances, and when it did provide comments, they could well come too late in the legislative process for key state decisionmakers to make appropriate use of them.

When you draft your FTC authorization measure this year, Mr. Chairman, the Coalition for Competition urges you to reject the restrictions proposed last year in the House. The FTC has already contributed greatly to the consideration of regulatory proposals at both the state and federal levels, and it should remain free to continue to participate. Your consideration of the Coalition's perspective on this issue is greatly appreciated.

Sincerely,

Lawrence R. Fullerton

Counsel to the Coalition for Competition

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President and Chief Operating Officer

June 27, 1989

Honorable Richard H. Bryan
Chairman
Subcommittee on Consumer
United States Senate Committee on
Commerce, Science and Transportation
SH-227 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to you on behalf of the more than 650 franchisors represented by the International Franchise Association who are concerned about proposed restrictions on the Federal Trade Commission's competition advocacy program which were proposed in last year's House version of the FTC authorization bill, H.R. 2897. I would request that you include this letter in the record of your recent subcommittee hearing concerning the FTC reauthorization.

We believe that the Commission's Competition and Consumer Advocacy Program has played an important and effective role in state legislative decisionmaking on regulatory policies. Representatives of our association have, on a number of occasions, appeared to testify in state legislative hearings on proposed legislation having potentially anti-competitive effects on franchising. It has been our experience that state legislatures generally lack the resources or expertise to examine fully the potential effects of such legislation and that when the Commission has presented testimony, it has filled this void in expertise. The benefits to consumers and to our member companies from the Commission's efforts through the competition advocacy program have been substantial.

Last year's House FTC authorization bill would have severely restricted the FTC's authority by burdening their operation with additional notice, documentation and paperwork requirements. It is our concern that these provisions would eliminate the flexibility which the Commission needs to be able to respond to opportunities to testify at the state legislative level. Many state legislative hearings are announced only one or two weeks prior to the date of the hearing. Moreover, because state legislative work is largely concentrated in sessions held every other year, enacting restrictions

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Honorable Richard H. Bryan
June 27, 1989
Page Two

on the percentage of the FTC's budget which could be expended on the competition advocacy program would unnecessarily hamstring the Commission's effectiveness during the very years when most state activity takes place.

On behalf of our members, we would urge you to reject the restrictions proposed last year in the House when you draft your FTC authorization measure this year and to preserve the FTC's authority to pursue this valuable program. Thank you for your consideration of our views on this issue.

Sincerely,

Neil A. Simon
Counsel and Director of
Government Relations

NAS:sap

STATEMENT OF THE AMERICAN DENTAL HYGIENISTS' ASSOCIATION

INTRODUCTION

The American Dental Hygienists' Association ("ADHA") appreciates this opportunity to present its views for the record regarding reauthorization of the Federal Trade Commission (the "FTC" or "Commission") Act. In particular, ADHA wishes to express its strong support for the FTC's Competition and Consumer Advocacy Program (the "Advocacy Program"), and its opposition to any unnecessary restrictions that would impede the operation of this beneficial and effective program.

Organized in 1923, ADHA is the only association representing the broad interests of dental hygienists in this country. ADHA's membership comprises approximately 30,000 practicing dental hygienists, educators, and students. ADHA's mission, "to improve the public's total health by increasing awareness of, and access to, quality oral health care", reflects the professional goals of ADHA's membership. ADHA serves as an advocate for dental hygienists at the federal, state, and local levels.

THE IMPORTANT ROLE OF THE ADVOCACY PROGRAM

Consistent with the historic mission and statutory responsibilities of the FTC, the Advocacy Program serves to promote competition and consumer welfare by making available to state legislatures and regulatory agencies FTC views on matters under deliberation. The FTC has performed a valuable public service in offering its often unique and independent perspective on state proposals that would unnecessarily burden the competitive process. In many instances, the FTC is the only disinterested champion of consumer interest in the face of parties with a direct financial stake in the outcome of legislative and regulatory decision-making.

The record suggests that FTC has played this role very successfully and has substantially benefited the general public. Indeed, the recent "Report of the American Bar Association Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission" (the "ABA Report") asserts that "[t]he FTC has consistently, and on the whole correctly, pursued the objective of promoting consumer welfare. It has generally provided quality advice about issues of consequence." Significantly, the ABA Report advises against restrictions on the Advocacy Program such as those proposed in S. 677 and H.R. 2897 during the 100th Congress.

THE ROLE OF THE ADVOCACY PROGRAM IN ORAL HEALTH CARE DELIVERY

Success in preventive oral health care, largely due to widespread use of fluorides, has caused significant changes in the patterns of delivery of oral health services. The decline in recent years of the public demand for more traditional oral health services has resulted in dentists spending substantially less time performing restorative services. Indeed, oral health care services have become much more prevention-oriented -- the traditional domain of dental hygiene. One response to this situation by organized dentistry has been, in an effort to protect its economic interests, a well-organized campaign to increase the level of supervision of dental hygienists by requiring that a dentist be physically present whenever a hygienist works. Such a requirement unduly limits full utilization of hygienists' services, unnecessarily increases health care costs, and restricts access to preventive oral health services for under-served populations.

As health care costs have skyrocketed over the past decade and the trend toward increased competition within the health care marketplace has accelerated, the Commission has recognized the need for appropriate utilization of dental hygienists. A 1987 FTC study, Restrictions on Dental Auxiliaries: An Economic Policy Analysis, determined that restrictions preventing dentists from using dental hygienists to perform the tasks for which they are qualified reduce the efficiency of providing oral health services, raise the price of oral health procedures, and increase the average price of a dental visit. The study recommends the elimination of licensing laws which limit the number of dental hygienists in a dentist's practice.

In February, 1988, as part of the Advocacy Program, the FTC submitted comments to the California Board of Dental Examiners (the "Board") in response to a proposal by the California Dental Association ("CDA") which would have changed significantly the rules governing the practice of dental hygienists. In particular, CDA's proposal would have required the examination of patients by the dentist before a hygienist could provide a screening or any preventive services, as well as after any screening or services are performed. This rule change would have severely impaired public programs that provide basic oral health services to under-served consumers, such as school children and the elderly, by significantly increasing the cost of these services. Fortunately, CDA's proposal was rejected, as the FTC's comments helped convince the Board that the proposal would not be in the best interests of consumers.

This example clearly illustrates that the assistance of the Commission, through the Advocacy Program, can be helpful in making regulators aware of some of the ramifications of proposals which would inappropriately reduce utilization of dental hygienists. The FTC must retain its freedom to comment in order to protect the interests of consumers, subject to an appropriate level of Congressional oversight.

THE NEED TO KEEP THE ADVOCACY PROGRAM FREE OF UNNECESSARY RESTRICTIONS

Taken together, the restrictions on the Advocacy Program contained in H.R. 2897 threaten to undermine the effectiveness of this valuable program with open-ended statutory burdens and constraints that are not necessary to achieve the goals of adequate internal administration of the program and proper congressional oversight. By contrast, the Senate bill (S. 687) is more flexible in its approach, requiring only that the Commission notify the Senate Committee on Commerce, Science and Transportation and the House Committee on Energy and Commerce at least 60 days before filing comments or appearing before a state or local body, or as far in advance "as is practicable".

Last year's House bill could be interpreted to provide that the FTC must receive a personalized written invitation to submit comments to a state legislative committee or federal or state agency (and, in turn, submit that invitation to Congress) _before_ the FTC may submit its comments to the body involved. This requirement would be wholly unrealistic in the case of state legislative and administrative proceedings, where interested parties are usually provided little notice of an opportunity for comment. The FTC should be free to submit comments whenever a state or federal body invites comments from the public at large -- the additional burden of a personalized invitation requirement serves no apparent purpose. Moreover, further statutory prohibitions on the FTC "soliciting" the required invitation would only stifle fact-gathering by both state agencies and the Commission.

The House bill also requires the FTC to notify Congress "upon initiating" an advocacy project and to supply the place and date of the planned comment, accompanied by a "statement of the reasons and justification" for the comment. A requirement that the FTC justify each comment in advance is an extraordinary burden that would slow the Commission's response time and invite interference. Indeed, such a process would likely become highly political, where policy decisions would be largely determined by the relative strength of the trade associations involved. Further, such a requirement would not contribute to proper congressional oversight since more traditional requirements for periodic summaries and reports from the Commission would provide Congress with a better overall perspective. The House bill provision requiring that the "Commission only and not the Commission's staff" make recommendations for amendment, adoption, or non-adoption of legislation or administrative regulations would undoubtedly increase the Commission's response time unnecessarily, particularly in instances where the FTC is submitting similar comments in a number of different states.

Finally, the House bill appears to contradict the current FTC statute which provides confidentiality for sources of information upon which the FTC relies in developing its positions. If the FTC is to continue to have an independent voice, it must not be subjected to continuous inquiry concerning sources of information. By seeking to examine the FTC's sources, the Congress would inevitably affect the ability of the Commission to obtain data.

CONCLUSION

ADHA urges Congress to resist unnecessary restrictions on the Advocacy Program. The FTC is uniquely positioned to champion consumer welfare in light of its long history and substantial expertise in dealing with issues that concern the competitive process. Congress should not burden the FTC with onerous new advance notice requirements which will effectively prevent it from sharing its expertise in these matters. ADHA has learned firsthand that the FTC has played, and should continue to play, a vital role in speaking out against anti-competitive state policies.

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STATEMENT OF THE AUTOMOTIVE SERVICE ASSOCIATION
ON THE AUTHORIZATION OF THE FEDERAL TRADE COMMISSION (FTC)
BEFORE THE
UNITED STATES SENATE
COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE
CONSUMER SUBCOMMITTEE

June 1989

The Automotive Service Association (ASA) is the oldest and largest trade association representing almost 11,000 independent service and repairs shops across the country. ASA urges Congress to restore the Federal Trade Commission's (FTC) authority to study, investigate and report to Congress on the activities of the $400 billion insurance industry.

The authority of the FTC to investigate the insurance industry has been severely emasculated by statute. Paragraph 4 of 15 U.S.C. Section 46(h) provides, in part: "The Commission may exercise such authority [to conduct studies and prepare reports relating to the business of insurance] only upon receiving a request which is agreed to by a majority of the Members of the Committee on Commerce, Science and Transportation of the Senate or the Committee on Energy and Commerce of the House of Representatives." Even if a majority of one of the Commerce Committees requests such a study or investigation, the FTC's authority to undergo the study terminates with the adjournment of the Congress that makes the request.

ASA urges Congress to include language in this year's FTC authorization bill which would strike this paragraph from the statute. The FTC is the watchdog agency for consumers, yet despite the significant economic impact that the insurance industry has on consumers, the Commission cannot, on its own discretion, examine the "business of insurance" to determine whether sufficient competition exists in this multibillion dollar industry. It is ironic that the FTC, whose "efforts are aimed at fostering and preserving our competitive system with the goal of maximizing consumer welfare (quote by Chairman Oliver)," is effectively barred from studying an industry which receives billions of consumer dollars annually. As FTC Chairman Oliver testified: "No one can deny that the insurance industry is a vital one for virtually all Americans. [There is] no reason for continuing the restriction with respect to the business of insurance."

The Supreme Court of California recognized the importance of insurance reform by recently upholding the legality of California's Proposition 103 in Calfarm Insurance Co. v. Deukmejian (May 4, 1989). Proposition 103 includes provisions which repeal the insurance industry's exemption from the antitrust laws and it calls for a rolling back of auto and property rates to 20 percent below November 1987 levels and freezing those rates until November 1989. At a time when the states are realizing that the insurance industry is under-regulated and, as a result, anticompetitive, Congress should respond on the national level by reathorizing the FTC to study and investigate this vital industry.

Opponents of insurance reform point to the periodic cycles of below cost underwriting. This may be due to predatory behavior by the large insurers trying to run the small, competitive insurers out of business. No one knows--no one can explain this irrational behavior by the insurers. The FTC should have the opportunity to study this and report on it to Congress.

During the debate on S. 677 (the FTC authorization bill from the 100th Congress), Senator Metzenbaum offered an amendment that would permit the FTC to study the business of insurance upon its own initiative. This amendment was adopted and included in S. 677, and ASA urges the Committee to include the language from this amendment in this year's FTC authorization legislation.

Small businesses continue to be the victims of the liability insurance crisis. Small businesses, like individuals, want to be able to ensure that there will be affordable insurance available to them. The property/casualty insurance industry is a $300 billion dollar industry, yet there is no federal oversight of this industry. Congress needs more information and data on the insurance industry, therefore the FTC should be reauthorized to investigate and study the effects of increases in property and casualty insurance rates on small business owners. In short, there needs to be closer scrutiny of insurance industry and the effectiveness of state regulation.

The collision repair industry is dominated and controlled by the nation's auto casualty insurers. The nearly uniformly vague, indefinite and confusing terms contained in nearly all auto insurance contracts lie at the heart of the insurers' ability to intimidate their insureds into adhering to their claims settlement policies and to thereby dominate and control the activities of the auto body repair shop owners. It is the McCarran-Ferguson Act which shields the insurance industry from antitrust prosecution for its collaboration on these uniform policies. ASA is convinced that it is these standardized policies which afford the insurers an inordinate ability to dominate, control, and abuse their insureds through the claims settlement process.

The threat of a variable deductible or of cancellation or jacked-up premiums all contribute to the insurers' ability to manipulate the uninformed and unwary insureds. The capitulation of the insureds to this manipulation gives the insurers the ability to covertly or overtly coerce repairers to adhere to the insurer-approved labor rate, the insurer-directed repair procedures and the insurer demands that shops use cheaper off-shore, non-standard and frequently substandard parts or salvage parts.

There is no question that millions of damaged vehicles have received substandard repairs that did not make the insureds whole, did not cover the loss, and therefore, did not restore the vehicle to its pre-accident condition. In short, these repairs did not live up to the terms and promises in the contracts of insurance--i.e. to make the loss whole.

The insurers' efforts to be the private regulators of the wages and hours of the third-party providers of goods and services for their insureds is a great disservice to the American people. The ultimate costs for this private system of regulation is enormous. Individual insureds may save some on premiums but billions of dollars annually are lost due to depreciation in the value of the vehicles which are not being fully restored.

It is long past time for the federal and state governments to step into this outrageous, self-serving claims process. The insurers must be made subject to the federal antitrust laws and to ongoing federal oversight of their daily claims settlement practices. In addition, effective state regulation must be instituted. To do anything less will leave in place a system that has been corrupted. The rising tide of consumer dissatisfaction with the auto insurers will continue to grow until equity and competition come into play and all collision repair shops can compete to sell quality repairs -- not simply standard, commercial, mediocre insurance-company-approved repairs.

If the insurers would divert some of the billions of dollars, now spent on trying to dominate and direct the collision industry through regulation of wages, hours, and procedures, to assuring quality repairs, the cost of insurance would not need to rise and yet vehicles could still be **fully** restored. If insurers would shift emphasis to quality repairs, rather than private regulation of the collision shops, the public would benefit. The insurers might even find that the public complaints about insurers would diminish.

The imposition of competitive disciplines upon the nation's insurers, under effective state regulation, will benefit all the American people including the body repair shops. Competitive quality repairs could once again become a source of pride for the automotive collision repair industry.

Bills have been introduced in both the U.S. House of Representatives and the U.S. Senate which would amend the McCarran-Ferguson Act and restrict the insurance industry's present antitrust exemption. ASA has urged the sponsors of these bills to remove the insurance industry's ability to jointly prepare these standardized, but vague and indefinite, insurance contracts. In the meantime, it is essential that this Congress reathorize the F.T.C. to investigate, study, and report on the insurance industry.

The Federal Trade Commission has not been formally authorized since 1982. As the agency charged with promoting free and fair competition and protecting consumers and businesses, ASA believes that though failure to formally authorize the Commission does not necessarily interfere with the daily functioning of the Commission, the process of reauthorizing the Commission will allow Congress the opportunity to evaluate the effectiveness of such an important agency and to confirm its support for the mandate of the agency. The Chairman of the FTC has testified that the Commission opposes exemptions from the antitrust and other consumer protections laws. The FTC particularly opposes the restriction on its authority to study the "business of insurance." In accordance, the Automotive Service Association (ASA) recommends that language striking paragraph 4 of 15 U.S.C. Section 46(h) be included in this year's FTC authorization bill.

STATEMENT OF JUNE 2, 1989, BY THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES REGARDING THE REAUTHORIZATION OF THE FEDERAL TRADE COMMISSION

This statement is respectfully submitted by the American Association of Advertising Agencies, Inc. (A.A.A.A.), the national trade association of the advertising agency business. The A.A.A.A.'s purpose in submitting this statement is to propose changes to the Federal Trade Commission Act which will restrain future abuses by the FTC staff in proscribing and regulating commercial speech.

IDENTIFICATION OF THE ASSOCIATION

The A.A.A.A. membership includes 760 advertising agencies from across the United States and the world. In addition to creating and placing more than 85 percent of all national advertising placed by advertising agencies in this country, A.A.A.A. member agencies also handle a substantial amount of regional, local and retail advertising for goods and services. As specialists in the art of communication, and as members of the public, A.A.A.A. agencies and their employees take an interest in the effects of FTC regulatory initiatives on the ability of advertising information to reach the public at large. The A.A.A.A.'s headquarters address is 666 Third Avenue, New York, New York 10017. Additionally, the A.A.A.A. maintains a Washington Office at 1899 L Street, N.W., Washington, D.C. 20036.

INTRODUCTION

These hearings on FTC Reauthorization are the latest round in a process begun nine years ago. Since then, the FTC has been forced to move forward each year with only interim provisions for guidance. As a result, a continuing cloud of uncertainty has hung over the Commission, to the detriment of virtually everyone.

We respectfully submit that now, after years of oversight hearings and countless hours of public testimony and legislative evaluation, the FTC deserves an amended FTC Act. We must, once and for all, provide sufficient direction and support for the Commission and its staff if they are to effectively perform their proper regulatory duties for years to come.

The A.A.A.A. first testified before this committee regarding FTC Reauthorization in 1982. At that time, and on several occasions since then, we have come before you with only a few legislative proposals. We have done so not to weaken the authority of the Commission, or to attempt to reduce the FTC's prompt and effective prosecution of appropriate cases. We have asserted consistently that any claims or statements which constitute harmful misrepresentations cannot be countenanced in our industry under any circumstances. We support the FTC as a national regulatory body that aims to protect consumers from injury due to false, deceptive or misleading advertising.

The time has come to cut through the thousands of words and phrases from special interest groups and to enact those modifications to the FTC Act which have stood the test of scrutiny during these years of legislative hearings. As we will set forth more fully herein, we believe our proposals have met that test, and deserve enactment. They simply provide a definition of Commission authority that will help to clarify the constitutional requirements and Congressional purposes that must govern responsible regulation of advertising.

I. POSITION ON "UNFAIRNESS"

The A.A.A.A. members believe that "unfair acts or practices" should not be employed as standard to regulate commercial advertising.

The "unfairness" concept provides advertisers with no standard against which they can measure their advertising; it allows the FTC to overstep the boundaries of its Congressional mandate; and it restricts the advertising community from exercising their First Amendment rights.

We believe these failings to be true both for use of "unfairness" in Trade Regulation Rulemaking and in Case-by-Case adjudications. After all, any practice the Commission may attempt to regulate by rulemaking, they also can attempt to regulate by case-by-case adjudications.

The Role of Advertising

Advertising has historically served our economy and the public well. It provides manufacturers an economic and efficient method of communicating information on goods and services. Advertising provides consumers with a range of information on which to base decisions.

However, advertising is by definition advocacy communication. It is meant to present a product or service in its best light, in a pleasing environment, and to truthfully present its benefits. It is part of the marketing process and as such is a sales tool.

Our members are disturbed by the philosophy that somehow advocacy in itself, especially when done effectively, is "unfair." This philosophy assumes advertising in its ideal form to be an impersonal third party message that carries with all the disclosures presumed relevant for the consumer to come to the "right" decision.

We believe this view does not represent the public's expectation or serve its interest. The term "unfairness," by lacking inherent metes and bounds, gives the Commission the charter to roam at will and experiment with these misguided philosophies.

The Problems with "Unfairness"

The advertising community can live with such terms as "deceptive" or "misleading." These are measurable, definable terms. We can, along with the Federal Trade Commission, quantify the degree to which consumers have been "deceived" or "misled," through research.

In contrast, "unfairness" is a subjective and unmeasurable term that is open to a wide variety of individual judgments. Use of "unfairness" can lead to many problems including over-regulation, waste of governmental and private sector funds, and, ultimately, restriction on the free flow of information to consumers.

- The Commission's unfairness doctrine escapes definition, and "fair" application. "Unfairness" is a vague term, amorphous and inaccurate in its interpretations. It eludes definition. "Unfairness" has never has a sharply-definied or widely-accepted meaning.

Even in 1914, Senators who supervised enactment of the proposal for a Federal Trade Commission were unable to offer a precise definition of what constitutes an "unfair" method of competition.(1) One study of the phrase "unfair methods of

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1) See, e.g., the remarks of Senators Francis Newlands and Albert Cummins, U.S. Senate, 63rd Congress, 2d session. Congressional Record LI. June 25, 1914. p. 11104; June 26, 1914. p. 11189; July 31, 1914, p. 13048. See also S. Rep. No. 597, 63rd Congress, 2d session 13 (1914).

competition" prepared shortly after the passage of the Act found so many diverse definitions that the phrase was revealed as virtually meaningless.(2)

- The vague notion of unfairness can and has resulted in Commission over-regulation. The unfairness doctrine is so vague as to be virtually unlimited in its applicability. It is bound only by the whims of those who happen to be appointed Commissioners as to what practices should be condemned.

The first Commissioners, until the mid-1970's, chose to move against advertising practices only when they were false or deceptive to consumers They thereby treated the term "unfair" as essentially synonymous with "deceptive" as a statutory authorization of regulation.(3)

However, the passage of the Magnuson-Moss Warranty/Federal Trade Commission Improvement Act, Pub. L No. 93-637.88 Stat. 2193 (1975), changed things. It authorized new industry-wide rulemaking by the Commission. Since then, attempts were made to breathe an independent life into the statutory phrase

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(2) Montague. "Unfair Methods of Competition." 25 Yale L.J. 20 (1915)

(3) For example, until 1970's the lawfulness of advertising was consistently evaluted in terms of "deception." See, e.g. Ward Laboratories, Inc. v. FTC, 276 F.2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960); Progress Tailoring Co. v. FTC, 153 F.2d 103, 105 (7th Cir. 1946); Jacob Siegel Co. v. FTC, 150 F.2d 751, 755 (3d Cir. 1944), reversed, 327 U.S. 608 (1946).

"unfair...acts or practices," 15 U.S.C. 45, 57a, and certain comments of the Supreme Court in FTC v. Sperry and Hutchinson Co., 405 U.S. 233 (1972), were asserted to establish Commission authority to prohibit, as unfair, commercial practices that are neither deceptive nor anti-competitive.(4)

As a result, the advertising community of the mid-1970's saw a new type of Commission; one that attempted to regulate truthful and nondeceptive commercial speech on the grounds of "unfairness." The Commission pushed "unfairness" to its outer limits. They embarked on such a far-reaching regulatory program, as to reverse the FTC's traditional role from policeman to that of societal engineer.

The initiative that best illustrates the unbounded scope of "unfairness" is the Children's Advertising Rulemaking proceeding. At that time, the Commission staff recommended prohibitions of televised advertising to young children. If enacted, it would have been unlawful to advertise any product on television programs in which children make up a sizeable percentage of the audience.

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(4) In the Sperry & Hutchinson decision, which did not involve commercial advertising practices, the Court stated that the FTC can operate "like a court of equity" to consider "public values" in determining standards of fairness. 405 U.S. at 244. Unfortunately, the Court offered little guidance as to which "public values" the Commission should further, and how it should be done. Quoting from the Commission's 1964 Cigarette Trade Regulation Rule, 29 Fed. Reg. 8324 (1964), the course suggested only that the Commission could regulate offensive, immoral, unethical, oppressive, unscrupulous, and substantially injurious practices. 405 U.S. at 244 n. 5.

The children's advertising rulemaking is but one Commission activity that raised troubling social policy and overbreadth questions. The Over-the-Counter Drug Advertising Rule was clearly another. These cases demonstrated the major problem of the Commission's "unfairness" doctrine, as applied to commercial advertising content: it is virtually unlimited. Past actions show that the Commission has, and would inevitably again, interpret its "unfairness" authority as a license to roam at will and proscribe whatever it wishes.

- Over-regulation based on "unfairness" impose unnecessary costs on government, business and consumers. We would like to remind this committee that there never has been a commission rule based solely on "unfairness." Can it then be assumed that no injury is done?

The answer is a resounding "no." Unnecessary hearings are time-consuming. The Children's Advertising Rulemaking Proceedings consumed many wasteful years. Government staff time in these proceedings was time away from more valid pursuits. Comments were filed by numerous individuals and/or companies. Lawyers and advisers had to be compensated. Regrettably, the persons who ultimately paid were the American people, as taxpayers and consumers.

- Past regulatory abuses act to restrain advertisers, costing consumers valuable, truthful information. The threat of a possible "unfairness" charge inhibits inventiveness and innovation in advertising. "Unfairness" deprives American consumers. It limits the imagination of the creator, and therefore advertising's potential is limited.

Communication requires a sender and a receiver. The right to speak freely implies an equal right for the public to hear those speaking. Indeed, the freedom to learn and to be fully informed about commercial products is equally as important as is the freedom to tell.

Over-regulation is especially worrisome when directed against these freedoms. Any regulation which seeks to test advertising practices by a standard of "unfairness," a vague standard based on the subjective value judgment of the Commissioners, constitutes a form of censorship. If the whims of one agency as to what is or is not "unfair" can be imposed upon the dissemination of truthful information to consumers, then individual choices of all citizens are in jeopardy.

The Supreme Court of the United States in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976), unequivocally established that commercial speech enjoys First Amendment protection. The Court said, "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them. ...It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse, if it is freely available that the First Amendment makes for us." The Supreme Court's statement in Virginia Board remains good law.

The A.A.A.A. believes that the Virginia Board case is perhaps the clearest expression of rights enjoyed under commercial speech. The FTC cannot ban commercial speech because of an unsubstantiated belief that its message is detrimental. The American public has the right to be informed.

* * * * *

In summary, the A.A.A.A. is not submitting its proposals as a "special interest." We do not seek a special exemption from any FTC jurisdiction that applies to organizations in general. However, we believe that the FTC has sufficient power to protect consumers and business without using the "unfairness" standard.

II. POSITION ON STATE ATTORNEYS GENERAL

The A.A.A.A. opposes any proposed legislation that would amend the FTC Act to extend the authority of individual State Attorneys General to bring lawsuits in Federal Court to enforce the FTC Act. Such legislation would be unnecessary for any proper goal of regulating intra-state activity. On the Federal level, the effect such legislation would have particularly on national advertising would be at best, chaotic.

There is no indication that the State Attorneys General could bring any expertise or new perspective to the enforcement of the FTC Act that is not already possessed by the FTC. The availability of the FTC Act to State Attorneys General, to initiate actions in Federal Courts, is unnecessary and redundant.

The FTC bears the interest of a nation and has a broad national perspective. By definition, the State Attorneys General would have a more difficult time defining the national interests versus their states' specific needs.

National advertising should not be subjected to one or more lawsuits from across the nation due to a complex regulatory system with several different masters. National advertising is intended to be exactly that, national in its field of reach. Hence, it should have to comply with the guidelines of one oversight body with a national scope of enforcement: the Federal Trade Commission.

CONCLUSION

We greatly appreciate this opportunity to present our views on these important subjects. For nine years we have put forth suggestions for the FTC Act, and we continue to believe that they are in the best interests of our nation. We look forward to their enactment. Thank you.

NATIONAL INSURANCE
CONSUMER ORGANIZATION

STATEMENT FOR THE RECORD ON THE FTC REAUTHORIZATION

BY J. ROBERT HUNTER, PRESIDENT
NATIONAL INSURANCE CONSUMER ORGANIZATION

Although a major priority of NICO is the earliest possible repeal of the McCarran-Ferguson Act, a logical legislative adjunct relates to the Federal Trade Commission. Throughout most of this century the public has looked to this agency as the major enforcer of consumer protections in the marketplace. Yet, for almost a decade the FTC has been statutorily restricted in its ability to even study, let alone investigate insurance industry related practices.

Increasingly one can conclude that in today's society insurance ranks as a true necessity of life. Over the past five years as the consumer price index rose by 18.7%, automobile insurance rates have risen by 63.1% even as the stock value of auto insurance companies rose by 76.4%! The property/casualty stocks, have risen by 536.3% during the eighteen years for which statistics have been kept by A.M. Best & Company.

Insurance is a critical budget item for American households. Indeed, it ranks as the third most expensive American household purchase, food and housing being the only other items which make a bigger dent in a family's pocketbook. The average family is spending approximately $1200 per year just on automobile insurance with a total annual outlay of some $7,000 for all their various insurance needs. That means that seventeen percent of

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the average family's disposable income is going directly or indirectly to insurance costs. No wonder there is a consumer revolt!

The time has come for the Congress to reinstate the FTC's fullest possible authority to study and investigate insurance practices and additionally to vigorously rely on the entire range of the agency's enforcement authority to protect insurance consumers.

Section 14 of the Reauthorization is a minimal first step. It identifies one specific insurance need of the elderly relating to Medigap insurance. It also evidences the dramatic coverage problem faced by a host of insureds (small business owners, local governments, physicians, nurses, nurse-midwives, dentists, and child-care centers). Over the past seven years these classes of insureds have been particularly hard-hit by skyrocketing premium increases in the property and casualty insurance lines.

Accordingly, NICO urges the Legislature to remove the restrictive language first enacted in the FTC Improvements Act of 1980 so that the FTC can as soon as possible not only address the parameters of Section 14 but to go even further to protect insurance consumers.

STATEMENT OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE INTERNATIONAL NEWSPAPER ADVERTISING AND MARKETING EXECUTIVES

INTRODUCTION AND SUMMARY

The American Newspaper Publishers Association (ANPA) is a national trade association representing nearly 1,400 newspapers, located primarily in the United States and Canada. ANPA membership accounts for more than 90 percent of the total daily and Sunday circulation in the United States. A substantial number of weekly newspapers in the United States also are ANPA members.

The International Newspaper Advertising and Marketing Executives (INAME) is a non-profit group of advertising and marketing executives from daily newspapers primarily in the United States and Canada. INAME membership also represents approximately 90 percent of the daily newspaper circulation in North America.

ANPA and INAME strongly urge this committee, in reporting reauthorization legislation, to require the Federal Trade Commission (FTC) to retain the language of its existing "Guides for Advertising Allowances and Other Merchandising Payments and Services", especially Guides 7, 9, and 14.

We believe that the revisions proposed by the staff and suggested by Chairman Oliver will: (1) undermine Congress' purpose of assuring equal treatment of competing customers and (2) sanction alternative allowance plans that are not usable by all of the competing customers that are excluded from the basic plan.

BACKGROUND

The FTC October 26, 1988 published proposed amendments to its "Guides for Advertising Allowances and Other Merchandising Payments and Services" (Guides).1/ The Guides, originally issued in 1969 and amended in 1972, assist businesses in complying with Sections 2 (d) and (e) of the Robinson-Patman Act (Act) by interpreting those sections, based on controlling case law and by giving guidance in those areas not illuminated by cases. Sections 2 (d) and (e) prohibit sellers (i.e., manufacturers, wholesalers, or distributors, etc.) from granting special allowances to buyers (often retailers) to promote the resale of products unless the allowances are offered to all competing customers on "proportionally equal" terms. Allowances may take the form of reimbursement for services or facilities (such as advertising or in-store displays) undertaken by the buyer, or they may take the form of services or facilities (such as catalogs, display materials or prizes for conducting promotional contests) directly furnished by the seller.

Newspapers are very concerned that certain proposed revisions to the Guides not only would unlawfully frustrate the intent of the Robinson-Patman Act but also would severely inhibit the ability of newspapers and other media to serve their retail customers. As Congressman John Dingell said in 1969:

> Since its enactment in 1936, the Congress has been able to anticipate that at least once a decade those opposing the rationale and objective of the [Robinson-Patman Act] will, in one form or another, gather their forces and storm the gate. 2/

These comments will focus on certain staff proposals, as well as Chairman Oliver's proposed Alternate Guides 8 and 11, which we view as this decade's massing of the troops.

The newspaper business relies heavily on the Commission's Guides in developing and administering cooperative advertising programs for its advertisers, i.e. retail businesses. Several newspaper organizations, like the INAME, the Newspaper Advertising Bureau, and the Newspaper Advertising Cooperative Network which market and sell advertising space to national, regional and local advertising users, use the existing Guides to educate those in advertising on the benefits of newspaper advertising. Cooperative advertising funds comprise most of the advertising budget for small to mid-size retailers. Although retail businesses of all sizes use newspaper cooperative advertising, small to mid-size retailers use most of their coop funds for newspaper advertising. In fact, small and mid-size retailers are the backbone of cooperative advertising for many newspapers.

Our specific concerns are addressed below.

PROPOSED REVISIONS

I. The Proposed Revisions Will Emasculate the Robinson-Patman Act and Undermine Congress' Purpose of Assuring Equal Treatment of Competing Customers.

Contrary to the assertions of the Commission, neither case law nor legislative history supports the proposed amendments to the Guides. The Robinson-Patman Act amended the Clayton Act in 1936 to prohibit certain discriminations in price, allowances and services effected by a seller among his customers. As more fully discussed in the attached legal analysis, the Act was enacted to protect and assure equal treatment of small businesses by sellers. It was passed in response to the problem of increased market power and coercive practices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.3/ Congress had made the determination that small independent merchants benefit our economy and that the Act was necessary to their survival. As he presented his bill to the House Judiciary Committee, Representative Patman stated:

> I believe it is the opinion of everyone who has studied this subject, that the day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive under that system. So we have reached the crossroads; we must either turn the food and grocery business of this ... country over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist ...4/

The proposed revisions will make it more difficult, if not impossible to detect violations of the law. The objective cost standard is essential for determining "proportional equality" -- the heart of Sections 2(d) and (e). Equality of treatment is assured only if sellers offer all alternative plans to all customers excluded from the basic plan. Buyers who induce discriminatory payments must be subject to the same high standard as sellers who offer such payments.

Rather than following the philosophical principles underlying the Act, the Commission is seeking to convert the Act into a tool of pure economic efficiency, devoid of congressional considerations. As stated by Mr. Mark Silbergeld, representing the Consumers Union in oral testimony on June 8 before the Consumer subcommittee, the Commission must replace "free market or Chicago School economic ideology with economic pragmatism". Too many economists who have not witnessed the real world market defects, are setting policy. Although "economic efficiency" may be appealing theoretically, it ignores the true goal of the Act and the real world market forces.

II. The FTC Staff Recommendation on Proportional Equality Ignores the Success of the Cost-Based Standard of the Existing Guides.

The FTC staff recommends that the current Guide 7 (renumbered as proposed Guide 8) reflect that "mathematical precision" is not required for sellers to satisfy the standard of proportional equality.5/ In addition to cost, any method that treats competing customers on proportionately equal terms may be used. A seller should be prepared to show that it has not engaged in discrimination if it offers different services or allowances for promotions in different media or to different customers. If different types or groups of customers are offered different services or facilities (or different combinations or levels of services or facilities), a difference in participation rates across customer types or groups does not in itself imply that services or allowances are offered on proportionally unequal terms.6/ However, unlike Chairman Oliver's proposal, the staff recommends that sellers should not vary the rate at which -- or limit the customers to whom -- a particular service, or payments for a service, is offered, in order to reflect differences in the productivity of individual customers.7/

The effects of this staff proposal is to loosen the requirement of "equality" and weaken the enforceability of the Act. It would sanction the tailoring of promotional programs that discriminate against particular customers or classes of customers (see footnote 3 to existing Guide 9).

The prototype cooperative advertising program is one that says, "We will pay X% of a retailer's cost of advertising up to Y% of his purchases during Z period. Coop experts call it the prototype because many manufacturers use it. It is safe. (It doesn't raise any questions about the Guides.) It is simple. (Any salesperson can explain it and any buyer can understand it.) It is what retailers are used to dealing with.8/ Thus, the mathematical precision of a cost-based standard assures the proportional equality necessary to help small retail businesses.

III. The FTC Staff Recommendation to Change Guide 9 ("Availability to All Competing Customers") Would Sanction Allowance Plans that are not Functionally Available to All Competing Customers.

Guide 9 requires that a seller's plan for making payments or furnishing services be tailored so that all types of competing customers may participate. The allowance plan should not be tailored to favor or discriminate against a particular customer or class of customers, but should in its terms be usable in a practical business sense by all competing customers. This may require offering all customers more than one way to participate in the basic plan or offering alternative terms and conditions to customers for whom the basic plan is not usable and suitable. If a seller offers alternative plans, all of the plans offered should provide the same proportional equality and the seller should inform competing customers of the various alternative plans.

The staff proposal would add the following language to existing Guide 9:

> "but it is not required to offer all alternatives to all competing customers."

Although the precise thrust of this proposed change is unclear[9], it would appear to immunize from liability a seller who offers an allowance to selective buyers and offers alternatives which are not usable by all of the excluded customers. For example, if a small retailer does not receive enough in promotional allowances under the basic plan to be able to participate in radio and television advertising, there is no violation if a manufacturer offers, alternative promotional assistance in the form of newspaper advertising or handbills. It would appear that the manufacturer would be in compliance with the Act even if only one of the excluded retailers could use the newspaper alternative. This will hurt the small retailer who often is not aware of the availability of cooperative funds. The biggest problem many newspapers have is educating smaller retailers on the availability of cooperative advertising funds. Indeed, cooperative advertising funds often go unused because many retailers, especially small retailers, don't know that cooperative funds are available.

On the other hand, manufacturers' representatives frequently are not interested in assisting retailers in using cooperative dollars. Because they are interested in quickly selling their product, these representatives will take the easy way out and go to the large retailers for promotion.

IV. The FTC Staff Recommendation to Delete Footnote 2 to Guide 9 ("Availability to All Competing Customers") Undercuts the Benefits of the Cost-Based Standard.

Footnote 2 states that "[a]llowances having little or no relationship to cost or approximate cost of the service provided by the retailer may be considered to be in violation of Section 2 (d)..., such as an allowance of $1 per case of goods purchased if the retailer furnishes a display or provides specific shelf space, or a promotional allowance of 10% of purchases during a specific period of time if the retailer places an ad of at least 3 column inches in a newspaper..." This footnote refers to an example of a plan using short-term store displays of varying sizes so that all customers may use the promotion in a practical business sense.

Deletion of this footnote will take away the benefits of the cost standard. Adherence to the cost standard assures the enforceability of the Robinson-Patman Act. Large retail chains[10], to the detriment of small retailers, would be encouraged to exact price discriminations disguised as promotional allowances.

V. The FTC Staff Recommendation to Delete Footnote 3 to Guide 9 ("Availability to All Competing Customers") Would Encourage Discriminatory Practices Against Small Retail Businesses

Footnote 3, in pertinent part, reads as follows:

> "In order to avoid the tailoring of promotional programs that discriminate against particular customers or class of customers, the seller in offering to pay allowances for newspaper advertising should offer to pay the same percent of the cost of newspaper advertising ... in a newspaper of the customer's choice ... Examples of promotional plans that may discriminate against small retailers are: (1) a plan that offers to pay 75% of the cost of advertising in daily newspapers, which are the regular advertising media of the seller's large or chain store customers, and only 50% of the cost of advertising in other newspapers that may be used by small retail customers; and (2) a plan that pays allowances for advertising in daily newspapers, which are the regular advertising media of the seller's large or chain store customers, but does not pay allowances for advertising in semi-weekly, weekly, or other newspapers that may be desirable by small retail customers, who are offered, as an alternative to advertising in daily newspapers, services such as envelope stuffers, handbills, window banners, etc."

Deleting this footnote would encourage some sellers to revert to discriminatory practices against small retailers by paying a lower percentage of the cost of cooperative advertising when it is placed in a smaller daily or weekly newspaper instead of a large daily.

VI. The Subjective Imprecision of Chairman Oliver's Proposed Alternate Guide 240.8 is a Formula for Mischief that is Impractical for Sellers to Administer.

Chairman Oliver recommends that the proposed Guide 8 go further than the staff's recommendation to make it clear that a seller can vary its allowance rates or services to reflect differences in the "value" of the promotional service received by the seller. The phrase "proportional equality" would be redefined to reflect the amount of effective promotional services that a seller receives from its customers per dollar of promotional expenditure. Sellers also could vary allowances and services with the identity of the customer, as well as the media used, provided that they have "reliable evidence" showing that different allowances for different customers are justified by differences in the amount of effective promotional services those customers provided.

The Chairman's alternate proposal would result in shifting advertising dollars away from newspapers to other media that may not usable by all competing customers.

A seller would be justified in making larger payments to customers using certain media if it has "reliable evidence" that it derives greater effective promotional services from expenditures in those media or from those customers (in other words, if the customer is more productive than its competitors). Because sellers can design individual programs for individual customers based on their customers' performance, it would be almost impossible to have proportionally equal allowances under a "value" standard. Congress intended the expression "proportionally equal terms" to require sellers to grant, under identical circumstances, the same allowance to another customer based on the quantity of purchases.[11/]

In addition, the requirement that sellers use "reliable evidence" adds further chaos to the process of determining "value". Electronic media use a method of estimating their reach and frequency that drastically could affect the way manufacturers assign value. A manufacturer comparing newspaper circulation with TV and radio coverage in a particular market almost always will assign a higher value to the electronic media over print. Yet, the coverage or reach of a particular medium tells only a part of the story. The response rate of newspaper readers to advertising may be greater than the response rate of TV viewers to commercials or, perhaps, the particular product being promoted on behalf of the manufacturer may be more appealing to recipients of a direct mail package than to radio listeners.

In short, there is no universally accepted "reliable evidence" which could cost justify the effectiveness (value) of any promotion. Chairman Oliver's imprecise "value" standard would complicate the task of accurate comparisons of the promotional allowances being provided to competing large and small customers using competing advertising media. Seller-manufacturers would be given a license to reimburse whoever they want and at whatever rate they want as long as they can find some data to support their assignment of value.

For example, if "reliable evidence" available to a seller indicates that a television commercial reaches 5,000 people while the same ad in the local newspaper reaches only 2,000 people, that seller can maintain proportional equality by offering to pay 100% of the customer's cost of using television and 40% of the cost of newspaper advertising. If (using the same example) the seller has reliable evidence demonstrating that persons reached by newspapers are twice as likely to purchase the seller's product as those reached by television, then the seller can maintain proportional equality by offering to pay 80% of the cost of newspaper advertising.12/

Some retailers that purchase small quantities of the seller's product may find advertising on television too expensive. These retailers, that use more affordable advertising media such as newspapers, would not receive proportionally equal treatment, thus discouraging them from participating in the seller's program.

In contrast, the current Guides require sellers to reimburse their competing customers the same percentage of the customers' advertising cost regardless of the media used. The objective measurement of cost has made it easy for newspapers to educate its retail customers on the availability of cooperative funds. Discriminatory practices can be readily detected under the existing Guides.

VII. Chairman Oliver's Proposed Alternate Guide 240.11 Improperly Distinguishes A Buyer Who Coerces a Seller into Granting Discriminatory Allowances and Services From a Seller that Offers Them to Select Buyers.

The current Guide 14 (which is similar to the staff's proposed Guide 11) extends the per se standard of seller liability to buyers. The Commission may proceed, under Section 5 of the FTC Act (which prohibits unfair methods of competition), against any customer who knows, or should know, that he is receiving payments or services which are not available on proportionately equal terms to his competitors engaged in the resale of the same seller's products.

Chairman Oliver proposes to change the standard from automatic illegality to a standard of reasonableness under the circumstances. He believes that the FTC should proceed against only those buyers engaged in inducement practices that actually injure competition. Establishing injury to competition typically will require a showing that the customer possesses substantial market power.

Discriminatory inducements by buyers would have the same negative impact as discriminatory allowances offered by sellers. In addition, the above-mentioned examples of the tendency of large retail businesses to abuse the system points to how everyone -- especially, small, independent merchants -- stand to lose if a more relaxed legal standard is combined with a pre-existing inclination to abuse the system.

Liability of a buyer that knows or should know that it is receiving a discriminatory price through services or allowances not made available on proportionally equal terms to its competitors should result automatically whether the discrimination takes place directly through payments or services, or indirectly through deductions from purchase invoices or other similar means.

CONCLUSION

For the reasons stated above, ANPA and INAME respectfully requests this committee, in reporting reauthorization legislation, to require the FTC to retain the language of its existing Guides, especially Guides 7, 9, and 14.

It is clear from these proposed revisions that the FTC intends to move away from an objective measurement of "proportional equality" which facilitates enforcement of the Act toward an amorphous standard that invites further abuse and even flagrant violations of the Act. Given the paucity of enforcement resources at the Commission, this direction will lead only to disastrous results for small merchants, the economy, and the public.

We respectfully ask this committee to include these comments in the hearing record, as well as the attached legal analysis and the joint ANPA/INAME Comments, which were filed February 15, 1989 with the FTC.

FOOTNOTES

1/ 53 Federal Register 43233

2/ Advertising Age, October 13, 1969

3/ 80 Cong. Rec. 3117, 6623 (1936)

4/ Hearings on H.R. 8442, 4995, and 5062 before the House Committee on the Judiciary, 74th Cong., 1st Sess., 5-6 (1935)

5/ 53 Fed. Reg. 43239

6/ *Id*.

7/ *Id*.

8/ *Sales & Marketing Management*, Vol. 133 at 98 (1984)

9/ An ANPA delegation met April 3 with two members of the FTC staff, Roy Lavik (senior attorney and principal draftsman of the proposed Guides) and James MacCarty (Assistant Director for Evaluation/Bureau of Competition). At that meeting, neither Lavik nor MacCarty could articulate what the staff intended by proposing this change.

10/ Even the Supreme Court in *F.T.C. v. Meyer*, 390 U.S. 341, 350 (1968) notes the pre-Robinson-Patman concern of Congress that the buying practices of large retailers, particularly the chain stores, was threatening the continued existence of the independent merchant. See. *Meyer*, *supra*, citing FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess., n. 12 at 78 (1935)

11/ 80 Cong. Rec. 3116 (1936)

12/ 53 Fed. Reg. 43245, Examples 4 and 5

13/ 53 Fed. Reg. 43241

STATEMENT OF THOMAS K. ZAUCHA, PRESIDENT AND CEO, NATIONAL GROCERS ASSOCIATION

The National Grocers Association (N.G.A.) appreciates this opportunity to express its views on the reauthorization of the Federal Trade Commission. The National Grocers Association represents 2,300 retail grocers and food wholesalers in the independent sector of the food distribtion industry. Our retail grocers own and operate convenience stores and supermarkets in every state in the union, while association food wholesalers operate food distribution centers which serve these retailers. N.G.A. members have a direct interest in Federal Trade Commission policies and the enforcement of the laws under its jurisdiction.

I. PREDATORY PRICING REPORTS

In 1986 the National Grocers Association was instrumental in securing passage of an amendment to the budget bill passed by Congress at the end of the 99th Congress. The amendment requires reports twice each year by the Federal Trade Commission on potential predatory pricing activities throughout the nation.

In 1987, both the House and Senate passed the Federal Trade Commission Reauthorization Bill, S. 677. Both the House and Senate versions of S. 677 required the FTC to continue reporting to Congress on the Commission's predatory pricing enforcement activities for fiscal years 1988, 1989, and 1990. However, House and Senate conferees could not reconcile other controversial provisions in the bill and it died in conference in 1988.

In the absence of formal legislation reporting requirements, the FTC has chosen to respond to similar requests for data from Senator Ernest F. Hollings and Representative Thomas Luken. The specific record of submissions has consisted of the following:

The Commission has submitted two reports to Congress describing the Commission's enforcement activity regarding predatory pricing. The first, submitted April 1, 1987, covered October 1, 1986, through February 28, 1987. The second, submitted November 2, 1987, covered

March 1, 1987, through September 30, 1987. This report covers October 1, 1987, through September 30, 1988 (fiscal 1988), and October 1, 1988, through March 31, 1989 (the first six months of fiscal 1989). A report for the last six months of fiscal 1989 is due on November 1, 1989. In addition, the Commission responded on December 16, 1988, to the inquiry of Hon. Thomas A. Luken, Chairman, Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Committee on Energy and Commerce, regarding enforcement activity relating to predatory pricing.

There can be no doubt that these reports have proved of distinct value in terms of assessment and improvement of the national antitrust policy in this area.

Senator Ernest Hollings (D-SC), Chairman of the Senate Commerce Committee, has conveyed that "these reports certainly generated some interest at the Commission on predatory pricing. Given the overall philosophy of the current FTC members, we really couldn't expect much assistance, but at least we made them look into things."

In addition, Congress has had the opportunity to review the data provided under the N.G.A. supported FTC reporting amendments. These reports offer instructive materials as to the potential dangers posed by anticompetitive market practices throughout the nation.

The National Grocers Association strongly endorses the necessity for adequate legislative protection in these areas. Certainly, the Federal Trade Commission cannot be permitted to conduct its ongoing affairs in a virtually vacuum-free explanation. Nor is it reasonable to rely upon the "goodwill" or cooperation of the Chairman and his staff to provide Congress the information which it requires. Only legal reporting requirements can offer a full and adequate guarantee. The predatory pricing reporting provision supported by the N.G.A. would do just that.

It would require the FTC to submit reports twice a year to appropriate congressional committees on complaints filed, investigations opened or closed, complaints issued, and other FTC actions taken. In addition, the FTC is to include a statement of the reasons for the action taken.

Our full reasons for the endorsement of this legal policy amendment can be made clear very briefly and simply.

Within the Washington environment it is a basic imperative that regulatory agencies not "become a law unto themselves" and be permitted to utilize their discretionary authority in a manner which defeats the principle of direct accountability to the people and their duly elected representatives. The National Grocers Association strongly endorses the proposition that as a direct part of its ongoing legislative reauthorization the Federal Trade Commission should be required to biannually report to relevant Congressional committees in terms of predatory pricing complaints filed, investigations opened or closed, complaints issued, and other relevant FTC actions undertaken with an appropriate explanatory statement for each course of conduct. Such information will greatly assist Congress and the private business community in exercising proper oversight authority and holding the FTC's "feet to the fire" in assuring a fair, competitive marketplace. Such informational requirements can also act as an important deterrent to potential predators who will realize the possible publicity and regulatory-legislative scrutiny to which their actions may be subject.

II. PROPOSED CHANGES IN FTC ADVERTISING GUIDELINES

The Federal Trade Commission staff has recently recommended certain changes to the Commission's Guides on Advertising Allowances and Other Merchandising Payments and Services ("Guides"), issued on May 29, 1969 and amended on August 4, 1972 (16 C.F.R. Part 240). In addition to the staff recommendations, the Commission Chairman Daniel Oliver issued his own "Concurring Statement on Proposed Revisions to the Guide for Advertising Allowances."

The Guides are intended to assist business in complying with section 2(d) and 2(e) of the Clayton Act, 15 U.S.C. 13(d), (e) as amended by the Robinson-Patman Act. The basic directions of the proposed revisions focus upon three major areas:

1. Allow manufacturers to offer large buyers, such as major grocery chains, allowances not offered to smaller buyers simply based upon the "subjective perception" that the large buyer is more valuable to the seller. For example, a chain with a dominant share of its market could receive a higher per unit allowance or a higher reimbursement rate than given a smaller retailer, even though both might purchase the same amount of goods and spend the same amount promoting them.

2. Allow manufacturers to offer non-grocery classes of trade, such as price clubs, mass merchandisers and discount department stores, special multi-packs and sizes of products, as well as credit for returns without being required to make similar products or credits available to competing grocers.

3. Allow manufacturers to offer special shelf and other allowances to large buyers without clearly being required to make these allowances available to other buyers on a proportionally equal basis.

Upon setting out such recommendations to the general public, the Federal Trade Commission issued a request for comments, 53 Fed. Reg. 43233-43245 (October 26, 1988) to which the National Grocers Association and numerous other organizations responded with substantial materials. Attached to this statement is a copy of the formal comments filed by the National Grocers Association with the FTC in this regard.

Basically, our examination of the proposals has led to the conclusion the Federal Trade Commission should not be permitted to unilaterally revise or reinterpret critical sections of its Guides for Advertising

Allowances and Other Merchandising Payments and Services and/or subsections 2(d) or 2(e) of the Robinson-Patman Act. The landmark changes now under consideration at the FTC would unfairly affect what ad, shelf and promotional allowances manufacturers can legally offer buyers. The result would radically bias the Robinson-Patman Act in favor of corporate chain customers and non-grocery retailers. In so doing, it would produce legal denial of fair competitive treatment in the marketplace for independently-operated retail grocers and their wholesalers. These changes threaten immediate, adverse bottom line impact to every independent grocer.

In terms of the proposal which would allow manufacturers to require the use of suggested ad prices by retailers as a condition for participating in cooperative ad programs, the Counsel for the National Grocers Association Mr. Ronald A. Bloch of the firm of McDermott, Will & Emery concluded:

> "This is a blatant attempt to reinstitute a resale price maintenance program that Congress says is wrong. It's illegal for manufacturers to fix prices, yet FTC seems to be going the other way, saying it's OK for manufacturers to require advertising of suggested prices to participate in a co-op ad program.
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> We feel this will either raise thousands of prices or result in lower regular price advertising on countless items, and the consumer loses either way, because the change would fix higher prices on numerous items presently advertised at a discount."

That comments and evaluations such as these represent the core of the American business community is clearly demonstrated by a recent admission of an FTC representative that of all those comments received by the staff only two had clearly supported the value-to-the-seller test. The value-to-the-seller test clearly would emasculate the legal protections under the Robinson-Patman Act that Congress intended to provide competing customers against discriminatory allowances.

Obviously, the substantive merits of these suggestions are seriously deficient. No action in this direction should be taken until the full new Commission and its new staff have had a full and complete opportunity to study the matter with the utmost care.

Indeed, the entire "last-minute" procedure which has characterized these possible Guideline alterations should cause the Congress serious concern. The National Grocers Association believes that matters as serious and precedent shattering as these should not be permitted to be undertaken by a regulatory agency without timely *prior* notification of *specific* proposals by the FTC to the appropriate committees of Congress. It is essential that the potential for *meaningful* Congressional input or direction into the FTC proposed decisions be provided for in instances as important as this. The National Grocers Association strongly endorses creation of a legal framework which will guarantee prior Congressional notification rendering unilateral FTC action impossible.

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